TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~650~~ 26

UNITED STATES, PETITIONER,

vs.

MISSISSIPPI VALLEY GENERATING CO., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 19, 1960

CERTIORARI GRANTED APRIL 4, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~550~~ 26

UNITED STATES, PETITIONER,

vs.

MISSISSIPPI VALLEY GENERATING CO., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

[fols. 1-299]

IN THE UNITED STATES COURT OF CLAIMS

No. 479-55

Mississippi Valley Generating Co., on its Own Behalf, and to the Use of Others,

v.

The United States

Mr. John T. Cahill and Mr. William C. Chanler for the plaintiffs. Mr. Robert G. Zeller was on the briefs.

Mr. Kendall M. Barnes, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant. Messrs. John B. Miller, Herman Wolkinson and Robert E. Kaufman were on the brief.

Opinion—July 15, 1959

Madden, *Judge*, delivered the opinion of the court:

The plaintiff, an Arkansas corporation, made a contract with the United States, dated November 11, 1954. The Atomic Energy Commission, (AEC), was the agency which acted for the Government in the transaction. The contract required the plaintiff to build and operate a large plant for the generation of electricity, the plant to be located at West Memphis, Arkansas, across the Mississippi River from Memphis, Tennessee, and to sell the electrical energy there generated to the United States. After the site for the plant had been acquired and some preliminary work had been done by the plaintiff, but before any considerable amount of construction of the plant had taken place, an important event occurred which eliminated the Government's need for the electricity which it had contracted to buy from the plaintiff.

Because of the elimination of its need for the electricity, the Government, through the AEC, on July 11, 1955, orally, and on August 1, 1955, by letter, notified the plaintiff that [fol. 300] the Government was terminating the contract. On November 23, 1955, the AEC wrote the plaintiff that the Government had concluded that there had never been a valid contract between the parties. The Government's position is

that, there never having been a valid contract, it is not liable to the plaintiff for any costs incurred by the plaintiff prior to the termination of the contract nor for any damages caused to the plaintiff by its termination. The plaintiff's position is that the contract was valid, and that the Government is liable to the plaintiff for the costs which the plaintiff incurred in connection with the contract.

The Tennessee Valley Authority, (TVA), an agency of the United States, operates the largest unified enterprise in the country for the generation and distribution of electricity. Its general field of operation is the area drained by the Tennessee River and its tributaries. Since its establishment in 1933, it has constantly expanded its operations as the demand for electricity has increased. The AEC uses a large amount of electricity in its three plants at Oak Ridge, Tennessee, Paducah, Kentucky and Portsmouth, Ohio. TVA supplied the current used at the Oak Ridge plant and a considerable part of that used at the Paducah plant. The Portsmouth plant was supplied by the Ohio Valley Electric Corporation, (OVEC), a corporation formed by several nearby private utilities in 1952 for the purpose of contracting with the AEC and building a generating plant to supply electricity to the AEC's Portsmouth establishment.

TVA was supplying some 1,000,000 kw of electricity to AEC at Paducah, from TVA's generating plant at Shawnee, Kentucky. To meet the growing demands upon it, particularly in and about Memphis, Tennessee, TVA desired to build a new plant, to be operated by steam, at Fulton, Tennessee, on the Mississippi River upstream from Memphis, with a capacity of about 450,000 kw. Both houses of Congress had in 1952, however, rejected proposed amendments to TVA appropriation bills which amendments would have appropriated money to start construction of the Fulton plant.

The policy of the Eisenhower Administration, which took office in January 1953, was to have either private enterprise or local communities, rather than the United States, provide [fol. 301] electric power generating facilities. The President's State of the Union message of February 2, 1953, announced this policy. The President's new Director of the Budget, Mr. Joseph Dodge, eliminated from the 1954 fiscal year budget the appropriation for the Fulton plant, which

appropriation President Truman had proposed in that budget.

The Administration's policy with regard to public power was observed with approval by Mr. George D. Woods, chairman of the board of directors of First Boston Corporation, one of the leading investment banking concerns in the United States. First Boston had its offices in New York. Mr. Woods wanted to help to make the policy succeed. He obtained an appointment with Mr. Dodge, the Director of the Budget, and offered the services of First Boston. Mr. Dodge, a Detroit banker, new in the Government, wanted to have a study made to determine the controverted question of the extent to which the Government was really subsidizing the TVA. He needed a man experienced in public utility financing and expert in accounting and problems of the cost of money, and had not found such a man. Mr. Woods said that First Boston had such a man, Mr. Adolphe Wenzell, and he would see if Wenzell would undertake the work.

Wenzell was willing and, with the approval of his other superiors, he did accept the assignment. He served as a part-time consultant to the Bureau of the Budget, without compensation, but was to have $10 per day in lieu of subsistence, and reimbursement of his transportation expenses. It was understood that Wenzell would not sever his connection with First Boston and that he would continue to receive his regular salary from it. Wenzell began this work on May 20, 1953, and made his report to Dodge about September 20. In all, he spent 29 days in the Bureau of the Budget, and became acquainted with many of its staff. He had access to all pertinent reports and documents. His report, not surprisingly, indicated that the Government was, to a considerable extent, subsidizing the TVA. When he made his report to Dodge, he asked for and received permission to retain a copy, but was told that it was a confidential Bureau document and should not be shown to anyone else. Some time later Woods asked Wenzell to see the report and Wenzell let him read it.

[fol. 302] The work which Wenzell did for the Bureau of the Budget in 1953 resulted in his getting acquainted with Rowland R. Hughes, then the Assistant Director, later the Director, who, as we shall see, was a principal actor in the events in 1954 leading to the contract here in litigation.

In the fall of 1953 the Bureau of the Budget decided that it would not include money for the Fulton plant, desired by TVA, in the TVA appropriation figure to be presented to Congress in 1954, for the fiscal year ending June 30, 1955. Mr. Gordon Clapp, the General Manager of TVA, when he learned of this Budget decision, took the position that TVA must be allowed to reduce the amount of electricity it was supplying to AEC so that it would have electricity to satisfy the growing needs of other patrons. The Bureau began to draft language to be included in the President's budget message to the effect that an attempt would be made to relieve TVA of some of its power delivery to AEC, and that if that could not be done, the problems of the Fulton plant would be reconsidered.

Director Dodge in December of 1953 suggested to Admiral Lewis L. Strauss, Chairman of the AEC, and Mr. Walter J. Williams, AEC's General Manager, that capital expenditures by the Government for the Fulton plant could be avoided if AEC would contract with private industry for the construction of a generating plant that would supply 450,000 kw ~~of~~ power to AEC at its Paducah plant and thereby release the power which TVA was supplying there, so that that power could be used by TVA for its other requirements. Mr. Dodge reminded these men that, in two other instances, private utilities had made long-term contracts to supply power to AEC. Mr. Williams said he would consult with Mr. McAfee, who was president of one of the companies referred to by Dodge. McAfee's response was encouraging.

Dodge delegated to Hughes, the Assistant Director, the responsibility for the Bureau's part in pursuing the inquiry. AEC's only interest was in being assured an adequate supply of power. The interest of the Bureau of the Budget was that the necessary power be obtained, if possible, in a manner consistent with the Administration's policy of pro- [fol. 303] moting a private enterprise economy and keeping Government expenditures as low as possible.

Edgar H. Dixon, president of Middle South Utilities, Inc., which owned utilities operating in Arkansas, Louisiana and Mississippi, learned from McAfee that AEC might be seeking an additional source of power in the Paducah area. He was interested because of the possibility of selling power

and because he, like Woods of First Boston, wanted to lend a hand to the Administration in its effort to put the business of generating power into private hands. Dixon went to see Strauss, and conferred with him and his principal assistants. Hughes, at the Bureau of the Budget, learned of the meeting. He requested AEC to proceed with negotiations with private interests with a view to having additional power available not later than the fall of 1957. McAfee and Dixon were invited to a meeting to be held in Strauss's office on January 20, 1954.

About January 15, 1954, Hughes suggested to Dodge that Wenzell be again requested to assist the Bureau, because of his study of TVA and his knowledge of commercial transactions. By that time, the Administration had decided that the AEC should make a contract to purchase power from private sources, and that the Fulton plant would not be built. The Administration's fixed purpose, by that time, was to find private enterprisers willing to contract with it, and to make a fair and prudent bargain with them. Wenzell had had no part in those decisions.

For the Bureau of the Budget to know what would be a fair bargain, it had to know what interest rate the enterprisers would have to pay on the bonds which they would have to sell to finance the project. Wenzell was an officer of First Boston, a large enterprise whose business it was to find purchasers for such bonds. Since Hughes knew him and trusted him, it was natural that he should look to him for advice on the cost of money. Wenzell came to Washington on January 18, 1954, and conferred with Hughes. Hughes told him of the meeting with Dixon and McAfee, arranged for the 20th. He learned that Wenzell knew both these men, and asked him to attend the meeting and use his influence to impress upon them the need for prompt action on their part [fol. 304] in getting up a proposition to the AEC. Hughes then arranged for Wenzell to see Strauss, whom he had not met before. Strauss also emphasized to Wenzell the necessity for prompt action.

At the January 20 meeting, McAfee and Dixon pointed out that if an additional generating plant should be built near Paducah, and the AEC should later need less power, there would be no other market for the power in that area. It was recognized that the real need for power was in the Memphis

area, some 200 miles from Paducah, and that the new power, though bought and paid for by AEC, would be delivered to TVA and used by it to supply its customers. Dixon thought a more logical arrangement would be for TVA to contract directly for the needed power, rather than have AEC contract for it. The meeting moved to Hughes' office in the Bureau of the Budget. It was decided that Dixon would prepare a study of what it would cost for his company to construct a plant, across the river from Memphis in the territory of his Middle South company, capable of generating some 450,000 to 600,000 kw of power. To the suggestion of McAfee and Dixon that the arrangement of having AEC contract for power to be delivered to and used by TVA was awkward, Hughes responded that the decision as to what agency of the Government would make the contract would be made by the Government.

At the close of the meeting in Hughes' office, Wenzell and Dixon agreed that Wenzell would meet with a Mr. Seal of Ebasco, a company which performed engineering services for Dixon's companies, to enlighten Seal and thus expedite the study which Dixon was to make. Wenzell met with Seal in New York and reported to him the substance of the discussions up to date. He urged him to get to work on the study which Dixon had promised. On January 27 Seal and a Mr. Canaday, a vice president and director of Dixon's Middle South company, went to Wenzell's office in New York. They were engaged in formulating a plan for the project. Wenzell told them he would give them any help he could on the subject of the cost of money for the project. On January 29, Hughes telephoned Wenzell to find out what had happened at Wenzell's meeting with Canaday and Seal.

Wenzell had another meeting with Canaday and Seal, other visits with Hughes, and received a request from Dixon [fol. 305] that Wenzell get the opinion of First Boston on what the interest rates would be on the bonds in such a project. Wenzell called together the First Boston experts on the subject, and telephoned the answer to Dixon. During the following days, Wenzell had several meetings with representatives of the interested private utilities at some of which other representatives of the Government were present. All these meetings were held either at the request

of or with the knowledge of Hughes with whom Wenzell was in frequent touch by telephone.

When McAfee learned that the proposed plant was to be located in the Memphis area, he lost interest because that location was outside the area of the companies in which he was interested. Another company showed some interest in collaborating with Dixon, but shortly abandoned the idea. Hughes was disturbed because he feared that if Dixon could not get another company to join in the project, he might abandon it. About February 18, Dixon told Wenzell that he was to have a meeting the next day at the offices of The Southern Company, the owner of public utility companies operating, generally, in Georgia, Alabama and Mississippi. Wenzell reported this to Hughes who asked him to attend the meeting. Eugene A. Yates was the chairman of the board of directors of Southern, and was at the meeting, as were the other important officials of Southern.

Wenzell had known Yates for many years but had not, before this meeting, talked to him about the project here in question. Dixon made an earnest plea that Southern join in the project. Wenzell telephoned Hughes, reporting what occurred at the meeting. About February 20 Southern decided to take part in the project. Yates immediately notified Hughes. Dixon's Middle South and Yates' Southern are sometimes hereinafter called the sponsors.

Canaday and Seal had been working up a proposal and, on February 20, after Southern had agreed to join in the project, they began to put the proposal in draft form. On February 23, Dixon and Wenzell met Hughes at the Bureau of the Budget. Dixon showed Hughes an early draft of the proposal. On the same day Dixon, Yates, Kenneth D. Nichols, the General Manager of AEC, Wenzell and Mr. McCandless of the Bureau of the Budget reviewed the tenta-[fol. 306] tive draft to see whether it was complete enough to merit consideration by AEC. The draft which was reviewed said that it assumed a cost of money which had been given to it by responsible financial specialists, and that the offer was conditioned upon the sponsors' being able to obtain the money at those rates. In fact, the advice as to the cost of money had been given orally by Wenzell to Dixon, and had been incorporated in a draft of a letter written by Wenzell and addressed to Dixon on February 23, intended to be

signed by First Boston, but never actually so signed or delivered.

On February 25, Dixon's Middle South company and Yates' Southern company submitted to AEC a formal proposal offering to form a new corporation which would finance and construct generating facilities from which 600,000 kw of electric power would be delivered to TVA at the middle of the Mississippi River at Memphis, the power to be paid for by AEC. The proposal went into detail as to the terms of the contract, the method of computation of the charges for the power, reimbursement for taxes, etc. When AEC received the proposal, it asked the Bureau of the Budget for its opinion. Hughes introduced Canaday, Seal, and Barry of Southern, to Mr. Schwartz, Chief of the Resources and Civil Works Division of the Bureau. Hughes told Schwartz that he wanted an analysis of the proposal by March 2, and that the men whom he had introduced would be available to answer questions. The Bureau staff commenced the study. The AEC staff began a similar study.

Hughes advised Schwartz that Wenzell would come to see him on March 1. When he arrived, the staff was completing the study and preparing the memorandum which Hughes had requested. Wenzell sat in the conference and took the position that the estimates of costs in the proposal were too high.

On March 2 there was a meeting of the Bureau staff and Wenzell and Seal of Ebasco. Seal was shown the proposed staff memorandum and was questioned about various items in the proposal of February 25. After Seal had left, the staff, with Wenzell participating, completed its memorandum, which said that it did not have sufficient information to make a close analysis, comparing costs with those of TVA, and that active participation by TVA would be required for [fol. 307] such an analysis. The memorandum concluded by saying: "We believe that the rates involved are sufficiently close that negotiations should be entered into by the parties concerned." Wenzell then went to Seal's office, told him that the memorandum had been completed, and that Clapp of TVA and Nichols of AEC were to meet with Hughes on March 3.

Between March 3 and March 9, Wenzell, in New York, had telephone conversations with Hughes, Schwartz, Cana-

day, Seal, Yates and Dixon. All of these conversations related in some way to the project. On March 9, representatives of the Bureau of the Budget, AEC and TVA met and reviewed the draft of the analysis of the February 25 proposal. Wenzell was not present. Later in the day, in the Bureau, the completed draft was distributed to a group which included Wenzell, and a member of the staff gave an oral summary of the analysis. All present were of the opinion that the estimated costs in the proposal were too high. Wenzell was asked to so advise Seal and to find out whether the sponsors would make a better proposal. Wenzell advised Seal that the estimated costs were too high. Wenzell discussed with Dodge the subject of the estimated costs, told him that he, Wenzell, was not qualified to advise the Bureau on that subject, and suggested that the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission, be obtained. Dodge said he would find out whether Adams would be available.

On March 10, Dixon and Yates met with Mr. Linsley, chairman of First Boston's executive committee, in Linsley's office. Wenzell was present. Dixon was well acquainted with Linsley and had frequently asked for his opinion on security issues and the condition of the money market. Dixon wanted Linsley's opinion on the current situation with regard to financing a project such as the OVEC, which First Boston had assisted in financing some years before, and which was comparable to the proposed project.

On March 11 Wenzell attended a meeting of the staff of the Budget Bureau. As a result of the meeting, an AEC representative, Mr. Cook, telephoned Dixon and told him wherein the estimated costs were too high. A copy of the AEC-TVA analysis was given to Seal and Canaday who [fol. 308] were asked to study it, and submit their comments, together with the sponsors' minimum cost proposal by March 15 or 16. On March 16, Dixon, Yates, and their principal assistants met with Dodge. In preparation for this meeting, Dixon and his associates had met in his hotel room and prepared a draft of a letter to be sent to AEC in reply to the AEC-TVA analysis. Wenzell may have been present at the meeting. In any event, he was given a copy of the draft and made changes on it in his handwriting. The letter was never put in final form, signed, or delivered to AEC. Wen-

zell was present at the meeting with Dodge. Dixon and his associates urged Dodge to have an analysis made of their February 25 proposal by someone other than the AEC-TVA group. Wenzell renewed his suggestion that Adams of the Federal Power Commission be requested to make such an analysis. On March 19 Adams began to do that. On March 24 Adams and representatives of the Bureau of the Budget met with Seal, and Adams told him that the figures in the February 25 proposal were too high, and asked him to have the sponsors submit new estimates of costs. Adams had, on March 23, discussed with Wenzell the subject of the cost of money for the project. Wenzell, between March 17 and March 30, had telephone conversations with representatives of the sponsors, and of the Bureau. On March 30 he was asked by the Bureau to be present at a meeting on April 3.

The sponsors had become aware that their February 25 proposal would not be acceptable. They prepared new cost estimates and submitted them to Hughes, Adams and others on April 3, at the meeting which Wenzell had been requested by the Bureau to attend and did attend. The sponsors were told that if they would submit a new firm proposal based upon their revised cost estimates, it would deserve serious consideration. It is probable that during this meeting Wenzell stated to Dixon, Yates and Hughes that the information which he had previously given them with regard to the interest rate on the bonds of the proposed project was still valid.

Also on April 3d Wenzell talked to Nichols at AEC. Nichols told him that the sponsors' new figures were close to being acceptable. He asked Wenzell to encourage the sponsors to refine their figures and to submit a proposal based on [fol. 309] a fixed price for the construction of the new facilities, with details as to the basis on which the charges for power would be calculated. He told Wenzell that AEC could not consider a proposal which was not firm as to capital costs, nor one which did not contain cancellation provisions acceptable to the AEC. After the meeting with Nichols, Wenzell returned to New York, and did not make any more trips to Washington in connection with the project here involved.

The sponsors prepared a new proposal, after numerous discussions in Washington involving representatives of the

sponsors, the Bureau of the Budget, and AEC. Dixon delegated a representative to inquire of various investment bankers and institutional investors as to the cost of money for such a project. This inquiry showed that the rate of interest would be about 3½%, which was the figure that Wenzell had on prior occasions given to Hughes and to the sponsors.

On April 12, 1954, the sponsors submitted their new proposal, which was dated April 10. A representative of the sponsors had, some days before the submission, informed Wenzell that it contained a statement that the sponsors' offer was conditioned upon their being able to arrange financing upon the terms which responsible financial specialists had advised them would be available. On the morning of April 12, before the sponsors went to Washington to submit their proposal, they met in Linsley's office at First Boston. Wenzell was present. Linsley was requested to and agreed to give them a written opinion, signed by First Boston, confirming Wenzell's prior statements as to the current rate of interest on bonds for such projects.

The April 10 proposal received intensive study and analysis by the Bureau of the Budget, AEC and TVA, and representatives of the sponsors were called in for information and discussion. On April 24 Hughes, who had, on April 16, 1954, succeeded Dodge as Director of the Bureau, recommended to the President that the Bureau be authorized to instruct AEC to proceed to negotiate a contract with the sponsors, and to instruct AEC and TVA to work out the necessary interagency arrangements. On May 27 a proposal was received from another group headed by a Mr. Von Tresekow. This proposal was studied, and on June 14 Hughes and Strauss presented summary analyses of the Dixon-Yates [fol. 310] proposal, the Von Tresckow proposal and of the cost of the proposed Fulton TVA plant, to congressional leaders in conference with the President.

On June 16, with the approval of the President, Hughes gave to AEC and TVA the instructions which, he had, on April 24, recommended to the President. On June 30, AEC wrote the sponsors that their April 10 proposal "constitutes a satisfactory basis for negotiation of a definitive contract", and that AEC was ready to begin negotiations. Negotia

tions began on July 7 and ended with the signing of the contract here in litigation on November 11, 1954.

The Conflict of Interest Defense

Adolphe Wenzell's study of TVA for the Bureau of the Budget in 1953 is of significance in this case only as background. Through that work he became acquainted with Dodge, Hughes and others of the Bureau staff. He became recognized by Hughes as a man sympathetic to the Administration's purposes and policy with regard to public power and private enterprise. His company, First Boston, was expert in the financing of large utility enterprises. When the Administration decided that it would, if it proved feasible, obtain the needed additional electric power by contracting with a private generating enterprise, Hughes thought of Wenzell as a possible useful consultant and obtained Dodge's permission to employ him.

It hardly needs to be said that Wenzell and his permanent employer, First Boston, wanted the explorations into the possibility of making a contract for the erection of a generating plant with private capital to eventuate in a contract. Their enthusiasm in this purpose equalled, no doubt, but could hardly have exceeded, that of the President of the United States and his Director of the Bureau of the Budget. Wenzell was not hired by the Director to discover reasons why a contract should not be made. He was hired because he was a knowledgeable person and was on the Administration's side of the political-economic controversy about public versus private generation of electric power. It could hardly have been expected that the Administration would hire as a consultant an expert from the ranks of the enthusiasts for [fol. 311] public power. The Administration's policy was a perfectly legitimate one, and it had a right to use all legitimate means to make its policy succeed. Its powerful urge to get a contract put it at a possible bargaining disadvantage, but no claim is made in this case that the contract which was made was an improvident one.

Wenzell's function of advising the Government as to the cost of money, a large element in the cost of electric power produced by a plant built with borrowed money, was not an arduous one. A few well placed telephone calls by any

responsible person would probably have obtained such information.

Hughes really used Wenzell as an expediter. When Hughes learned that Wenzell knew McAfee, Dixon, and other important utility executives who showed an interest in the project which the Administration hoped to consummate, he used Wenzell to keep their interest alive and to get it into the form of a proposal which the Government could consider. Time was important. The construction of the needed plant would take years after a contract had been made. Those who preferred that the additional power should be obtained from a plant built by TVA with Government money were politically powerful, and were able and persistent. If the need became pressing, and there was no promise that private enterprise would satisfy it, the Administration's policy could not be maintained.

Wenzell discussed the subject freely with the representatives of the private sponsors. At the stage of proceedings during which he was employed by the Bureau of the Budget, there were no secrets. Every intelligent person knew that the Administration wanted to make a contract, and was anxious that private enterprise come forward with a proposal that would be acceptable. Hughes directed Wenzell to sit in the meetings of the sponsors and report to Hughes what he heard. He participated in the conferences of the agency staffs. He, no doubt, was able to give to Hughes a better overall view of events than any other person, and did, we should suppose, expedite the formulation of the proposal which formed the basis for the later negotiation of details and exact figures.

Wenzell had substantially nothing to do with the substance of the contract. He knew little about construction [fol. 312] costs and said so, recommending Adams to the Bureau for that function. The cost of money was determined by forces beyond the control of the contracting parties. While the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work. At any rate, he served the Administration faithfully in the tasks it assigned to him.

The Government says that the contract is invalid because of Wenzell's activities. It says that he had conflicting interests. As between the parties, the Government and the

plaintiff which succeeded to the interest of the Dixon-Yates sponsors, we see not the slightest conflict of interest in Wenzell's position. The interest which he shared with the President and the Bureau of the Budget, that the negotiations should produce a contract, was the Government's interest, though it coincided with the sponsors' interest. He served the Government, did what he was assigned to do, did nothing for the Dixon-Yates interest and received nothing from it.

The Government says that a conflict of interest resulted from Wenzell's position with First Boston. When the Government hired Wenzell, it knew of his position with First Boston, and it knew what business First Boston was in. It wanted Wenzell's advice as to the cost of money borrowed to build generating plants. There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract. As early as January 1954, it occurred to Mr. James, counsel for Dixon, that because of the public versus private power controversy which lay behind the whole project, and because First Boston would be a logical choice of the sponsors to manage the financing of the enterprise, if a contract should be made, critics of the project might make something of Wenzell's participation. At his counsel's suggestion, Dixon spoke to Wenzell, calling attention to the possibility of criticism, and suggesting that Wenzell discuss the matter with the Bureau of the Budget and with his counsel. Wenzell on the same day, February 23, spoke to Hughes about the matter, saying that it might become a matter of embarrassment [fol. 313] to the Administration, and suggesting that Hughes discuss the subject with his political advisers. Hughes said that Wenzell was exaggerating the importance of the matter, but advised him to discuss it with his principals in First Boston and with First Boston's lawyers, and then talk to Dodge about it. Wenzell, on February 23, discussed the subject with Mr. Coggeshall, President of First Boston, who arranged for him to talk to Mr. Raben of Sullivan and Cromwell, First Boston's counsel. Wenzell told Raben that he had orally advised Dixon as to the cost of money borrowed for such projects, and had written a draft of a letter containing

the same information. He said that First Boston had not been employed by the sponsors to handle the financing, but that it might be requested to do so if the Government and the sponsors should succeed in making a contract. Raben advised Wenzell to terminate his employment as consultant in the Bureau of the Budget forthwith, and in writing; to advise First Boston that if it was later requested to handle the financing, if a contract should be made, it should consider whether it would be wise to do so, or, at least, whether it would be wise to accept a fee for doing so. Raben also told Wenzell to keep Dodge and Hughes informed of any developments in the matter. Raben telephoned to his senior partner, Arthur Dean, who was in Washington. Dean said he did not think there was a conflict of interest, but there was a problem of policy. He confirmed Raben's advice as to what should be done.

Wenzell did not resign from the Bureau of the Budget immediately, but continued to work for it until April 3. Hughes did not call upon him for any services after that date. He never submitted a written resignation.

At least as early as April 12, Wenzell was of the opinion that if the Government and the sponsors made a contract, First Boston would be asked to undertake the financial arrangements for the sponsors. As it turned out, his assumption was unfounded, because, a month after that time, Dixon felt perfectly free to place 40 percent of the financing business with Lehman Brothers, and would, apparently, have felt perfectly free to place all of it elsewhere than with First Boston if he had so desired.

As we have said, the Government pleads the activities of Wenzell as a justification for its repudiation of its contract [fol. 314] with the plaintiff. This presents a problem which obviously requires exploration. Ordinarily, in a conflict of interest case, there is a person who is acting for the Government in the negotiation of a contract but, who at the same time, has an interest in the other party to the contract which interest would cause him, or tempt him, to promote the contract, or permit favorable terms to be inserted in it, because that other party, and he through it, would profit by his acts. Ordinarily the conflicting interest of such a person is unknown to his superiors, or to those of his superiors who are faithful to their duties to the Government.

The instant situation is unusual in several respects. Wenzell had no interest in the plaintiff, which the Government seeks to make the victim of Wenzell's situation. He was not hired by the plaintiff; he owned no stock in the plaintiff. He had an interest in First Boston which company, by the logic of circumstances, might be offered the work of arranging the financing of the project when and if a contract for the project should be made. The sponsors had, during the time that Wenzell had been working for the Bureau of the Budget, made no commitment to or had any discussion with First Boston about handling the financing of the hoped for project. That the sponsors did not feel that they were, somehow, under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came, in May, to make arrangements for the financing of the hoped for project, Dixon, as we have seen, insisted over the objection of First Boston that Lehman Brothers should have a 40 percent interest in the financing, because that firm had some special talents that might be of use.

The sponsors, though they had not employed Wenzell, nor given him any interest in their enterprise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' ad- [fol. 315] monition to Hughes, who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government, but adequate to destroy the enemy if it became necessary to resort to such a weapon.

There is, it seems to us, something essentially cynical about the Government's Wenzell defense.

The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skilful bargaining by representatives of the Government who had complete fidelity to their trust, and which became useless to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power. The purpose of the contract being thus frustrated, the Government summons, in order to escape its responsibilities under its honest contract, the great moral and legal generalization that a servant cannot faithfully serve two masters. We think the applicability of the generalization to the instant situation must be carefully scrutinized, lest, not uniquely, a worthy principle be used to arrive at an unworthy result.

Suppose the Government wanted to determine the feasibility of building a bridge in a difficult location. An experienced and reputable bridge engineer is an official of a steel company. The Government employs him as a consultant to work with Government staff engineers and other consultants to determine whether, and how, the bridge could be built, and to work out the terms of a contract with a contractor who has shown an interest in building the bridge. The consultant works through the feasibility stage of the investigation, and during the preliminary stage of negotiation with the contractor, when the question was whether the bridge could be built at a price which the Government would [fol. 316] consider it prudent to pay. Then the consultant ceases his work. The terms and details of the contract are laboriously worked out by faithful representatives of the Government and the contractor. The contract is signed. The contractor then begins to place its orders for the steel which it will need to build the bridge. It, for good business reasons, orders some of the steel from the company whose engineer had been employed by the Government as a consultant. Some event intervenes which convinces the Government that the bridge ought not to be built at all, and it cancels the contract. The contractor has been subjected to expense by the steps it took toward performance before the contract was canceled. It requests reimbursement for those expenses. The Government disclaims liability, on high moral principles. It con-

cedes that the contract was an honest one, fairly negotiated and agreed upon. It is obvious that if its intervening change of mind had not occurred, and the contract had continued to be regarded as advantageous to the Government, the Government would have insisted upon performance and would have sought to recover damages from the contractor if it had refused or failed to perform. But, it says, we, with full knowledge of the possibility that his company might make a profit by selling steel to the contractor if it should be decided that it was feasible to build the bridge, and if a contract to build it should be made, employed a consultant who had a part in the early stages of the deliberations about the bridge. The purported contract is, therefore, for moral reasons, a nullity.

In the hypothetical case, and in our instant case, the possibility of the consultant's principal employer's indirectly making a profit out of the project about which he was consulted, would extend to almost any conceivable private industry from which a competent consultant could be obtained. If an industry is not engaged in the kind of business about which the Government needs practical advice, it will not be called upon to furnish a consultant. If, then, the Government intends to treat the possible indirect interest of a consultant's employer as injecting a taint of illegality into any contract which might eventuate, the whole transaction becomes futile nonsense, a nullity before the beginning of [fol. 317] even preliminary discussion. The Government itself has introduced the impurity into the draught, and later spurns it, because it itself has polluted it.

In *Muschany* v. *United States*, 324 U.S. 49, 66–67, the Supreme Court said, with regard to the Government's argument that the contracts there in question were in violation of public policy and were therefore void:

> Our inquiry at this point, since corruption is not shown, is as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case.
>
> * * * * * * *
>
> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal* v. *Phila-*

delphia, 2 How. 127, 197–98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353; *Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy.

Our conclusion is that Wenzell's activities were not within the prohibition of the statute, 18 U.S.C. § 434,[1] on which the Government relies, nor were they such as to render the contract in question unenforcible on grounds of public policy.

We think that, to reach the conclusion that the criminal statute here in question had in fact been violated, we would have to discard all the precedents with regard to the proper interpretation of criminal statutes. We would have to conclude that 18 U.S.C. 434 was intended by Congress to be an [fol. 318] expansive net long enough and broad enough to catch a Government employee and subject him to fine or imprisonment if he saw in the transaction a possibility that it might eventuate in a profit to him, or if he thought, mistakenly, that it would eventuate in a profit to him.

As we have seen, Wenzell's employer, First Boston, through which Wenzell's criminal conduct must be established, if it is established, did not have an interest in the Dixon-Yates transaction until after Wenzell's Government

---

[1] "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisioned not more than two years, or both."

employment had terminated. There is not a shadow of evidence that it had any agrement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding. As we have seen, a month after Wenzell's Government employment had terminated, Dixon-Yates felt perfectly free to give the bond-selling business to whomever it pleased.

To treat such a prospect, or hope, or even mistaken belief in a nonexistent understanding, as a direct or indirect interest, subjecting the possessor of it to a fine or imprisonment or both, would seem to us to require that we discard all that the Supreme Court has taught us as to how to interpret a criminal statute. *Kordel* v. *United States,* 335 U.S. 345; *United States* v. *Halseth,* 342 U.S. 277; *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U.S. 284; *Yates* v. *United States,* 354 U.S. 298.

It is suggested that there is something sinister about the fact that Wenzell did not, as the lawyers for First Boston advised him to do on February 26, resign from his Government work "immediately, and in writing." Three days earlier, Wenzell had discussed with Hughes the possibility that if a contract should be made with the sponsors, First Boston might be asked to participate in the financing of it. Hughes thought that Wenzell was exaggerating the importance of the matter, and kept on calling on Wenzell to [fol. 319] do chores for him in connection with the contract, until April 3. The fact that Wenzell did not resign "in writing", he having been employed by means of a telephone call, and all of his assignments having been given him orally, shows that he did not understand the importance which the lawyers attached to having documentary evidence in the file for a possible Congressional investigation or a lawsuit. We see nothing sinister in his not being cagy. The lawyers did not advise Wenzell to resign because they saw in his situation a conflict of interest. They saw in it a question of policy,

for First Boston. On March 9 Wenzell was told by Dodge, the Director of the Bureau of the Budget, that since there was, at that time, not even a proposal which could be used as a basis for negotiation, and in any event a long period of negotiation would precede the making of a contract and its financing, there was no immediate problem with regard to First Boston's possible participation in the financing. He said that if there was a possibility that First Boston might participate in the financing, Wenzell should wind up his work for the Bureau of the Budget as soon as possible. As we have seen, Hughes, Dodge's Assistant Director, kept on giving Wenzell chores to do for some three weeks longer, until April 3. We think that Wenzell's failure to resign ostentatiously and immediately, as a lawyer might have done, is of no significance.

The Government urges, in effect, that the doctrine which it calls to its defense is a prophylactic generalization which must be applied in cases of honest transactions in order to keep it available and effective in cases of dishonest transactions. The thought is that the Government, like the infant and the idiot, must have the protection of a broad legal incapacity. In this case the actor for the United States was the Director of the Budget, acting immediately under and on behalf of the President of the United States. What he did was done legally, honestly, and with complete fidelity to the interests of the Government. The powers of even the Government's highest officials are defined by statute. We do not see in the case before us an instance in which the Government needs, as additional protection against the honest acts of its highest officials, a diaphanous cloak of immunity woven from an asserted vague and undefined public policy. [fol. 320] We point again to the language of the Supreme Court in the *Muschany* case.

The Government has interposed other defenses, in addition to the one founded upon the activities of Adolphe Wenzell. Because this opinion is already long, our treatment of these defenses will be brief.

The "Replacement" Defense

The Government says that section 164 of the Atomic Energy Act of 1954, 68 Stat. 951, 42 U.S.C. § 2204, did not au-

thorize the AEC to make the contract here in question. We quote the part of the section here pertinent in a footnote.[2] The argument, in brief, is that the electric power contracted for in the contract in question was not to be used by AEC, and was not to be furnished to TVA "in replacement" of power furnished by TVA to AEC. The legislative history of section 164 shows that its language was written for the purpose of authorizing the very kind of a contract that was eventually made. If furnishing power to TVA at Memphis so that TVA could continue to furnish power to AEC at Paducah without neglecting to fulfill the expanding needs of its existing customers is not aptly describable as replacing to TVA power furnished by it to AEC, then Congress can be said to have used inept language. That would, if true, be no reason for a court to frustrate the undoubted intention of Congress.

The "Waiver" Defense

The Government says that certain statutory requirements of section 164 of the Atomic Energy Act of 1954, *supra*, were not complied with, and that the contract, as a consequence, never became effective. It relies on the following language in section 164:

> [fol. 321] Any contract hereafter entered into by the Commission pursuant to this section shall be submitted to the Joint Committee and a period of 30 days shall elapse while Congress is in session (in computing such

---

[2] "The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof."

> 30 days, there shall be excluded the days on which either House is not in session because of adjournment for more than three days) before the contract of the Commission shall become effective: Provided, however, That the Joint Committee after having received the proposed contract, may by resolution in writing, waive the conditions of or all or any portion of such 30-day period.

The contract here in question was submitted to the Joint Committee on Atomic Energy on November 11, 1954, the day the contract was signed. Congress was not in session at that time, and that Congress did not reconvene. The new Congress convened on January 5, 1955. The Joint Committee had been in session for some days before November 11, considering drafts of the contract, and considering whether the committee should waive the 30-day waiting period. On November 13 the committee adopted, by a 10 to 8 vote, a resolution waiving the waiting period. On January 28, 1955, the Joint Committee adopted, by a vote of 10 to 8, a resolution rescinding the resolution of waiver of November 13, 1954.

The Government says that the Joint Committee had no authority to sit when Congress was not in session and that the purported submission of the contract to the committee on November 11, and the committee's purported waiver of the waiting period on November 13, were ineffective. AEC, in a brief filed with the Securities and Exchange Commission in proceedings in January 1955, seeking that Commission's approval of the plaintiff's equity financing, took the position that the Joint Committee had the power, though Congress was not in session, to waive the 30-day waiting period. The defendant herein, the United States, took the same position in a brief filed as *amicus curiae* with the United States Court of Appeals for the District of Columbia, in proceedings to review the SEC's order approving the plaintiff's equity financing. The General Counsel of the AEC, and the Assistant Comptroller General of the United States, in formal official opinions, took the same position. We agree with [fol. 322] these several opinions of representatives of the United States, rendered *ante litem motam*.

The "Indemnity" Defense

The Government says that the contract in question violated the following provision of section 12(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79(L)(a):

> It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to borrow, or to receive any extension of credit or indemnity, from any public utility company in the same holding-company system or from any subsidiary company of such holding company * * *.

In order to insure that the plaintiff would have sufficient income to amortize its bonds, as payments for that purpose came due, an agreement between the plaintiff and the operating subsidiaries of the sponsors was drafted, under which the subsidiaries agreed to take and pay for any surplus power which the plaintiff might have on hand because of the failure of TVA to take the agreed amount, and the subsidiaries also agreed to make up any shortage of power which the plaintiff might incur because of, for example, the disabling of its generators. The sponsors guaranteed the performance of the agreement by their respective subsidiaries. This agreement was called the "back-up and surplus power agreement." The making of this agreement was required by section 2.02 of the contract here in suit. The agreement was never actually executed because the Government's cancellation of the plaintiff's contract intervened.

The Government says that this agreement was a violation of section 12(a) of the Holding Company Act, quoted above. The SEC in its decision approving the plaintiff's equity financing, expressly held that the back-up and surplus power agreement was not a violation of section 12(a) of the Holding Company Act. The interpretation of that provision of that Act, and its application to various possible arrangements within utility systems, is peculiarly a subject for the expert handling of the Securities and Exchange Commission. We are not persuaded that its decision was erroneous.

[fol. 323] The "Regulatory Approvals" Defense

The Government says that the contract had not become effective because the plaintiff had not, at the time the Gov-

ernment terminated the contract, secured all the regulatory approvals which were required. The Government refers to section 8.15 of the contract which reads as follows:

> *Regulatory Approvals and Indebtedness:* The obligations of the parties hereunder shall be subject to the following:
>
> (1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;
>
> (2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract; * * *.

The Government points out that, though the SEC had approved the plaintiff's equity financing, that approval had been appealed to the United States Court of Appeals for the District of Columbia; that though the plaintiff had applied to the SEC for approval of its bank loan agreements and bond sale agreements, the SEC had not yet acted upon this application. It urges that since the regulatory approvals had to be "in form and substance satisfactory to the Company" (plaintiff), not only had the contract not become effective in point of time, but it was invalid for lack of mutuality, since the plaintiff could escape liability under it by being dissatisfied with the approvals which the pertinent regulatory bodies would give it.

The parties expressly agreed, as shown in our findings 8, 9 and 191, that the contract became effective December 17, 1954. They must, therefore, have construed the provisions of section 8.15, quoted above, as conditions subsequent. As such, they would mean that the plaintiff could escape liability only if it could not, after diligent effort, obtain regu- [fol. 324] latory approvals which would be satisfactory to a reasonable person, in the circumstances. There is no indication that the plaintiff was not diligent in seeking the neces-

sary regulatory approvals, or would have been dissatisfied with such approvals as were practically attainable. So far as appears, the only reason the plaintiff did not get the approvals was that the Government's cancellation of the contract rendered the plaintiff's applications moot.

We conclude that none of the Government's defenses is valid, and that it is liable to the plaintiff for its breach of the contract.

The Measure of Damages

The plaintiff does not seek to have its damages measured by the usual rule, which would entitle it to the profits which it would have made if it had been allowed to perform its contract and receive the compensation provided in the contract. The plaintiff says that the contract in question provided its own agreed measure of damages in case the Government should cancel the contract. It points to section 7.07 of the contract, entitled "Cancellation Prior to Completion." That section, which is quoted in full in finding 205, provides in paragraph 1 that if, prior to the commencement of commercial operation of the third unit of the plant, the power requirements of AEC should be so reduced that it no longer needed the power contracted for, and if TVA did not elect to take the power, AEC should be entitled to cancel the contract by written notice, the effect of the cancellation being stated in paragraph 2.

Paragraph 2 of section 7.07 provides that if the notice of cancellation should be delivered prior to the time when the plaintiff had incurred expenditures of $40,000,000 on the project, then

> the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable liabilities, costs, in- [fol. 325] debtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, in-

> cluding carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; * * *

The Government points out that there was no reduction in the power requirements of the AEC, hence the Government could not have canceled and did not cancel the contract pursuant to the provisions of section 7.07. The plaintiff says that it has the right to waive the wrongfulness of the cancellation and have its damages measured by the provisions agreed upon for cases of rightful cancellation.

The Government's insistence that its cancellation was a breach of contract, rather than a cancellation permitted by the contract, is an attempt by the Government to profit from its own wrong. We say this because we suppose that the Government would not take this position unless it thought it saw in it an advantage to be gained by having the damages determined by a measure other than that agreed upon in section 7.07 of the contract.

We think that paragraph 1 of section 7.07, fairly, though not literally, read, was applicable to the cancellation here in question. The cancellation took place because the Government no longer needed the power contracted for. The indirect and awkward arrangement of the contract was to have AEC purchase power to be delivered to and used by TVA. Section 7.07(1) said that if AEC's power requirements were reduced so that it did not need the power contracted for, and if, then, TVA did not elect to take it, AEC might cancel the contract, with the cancellation consequences provided in section 7.07(2). In fact, as both parties knew, AEC was never intended to get the power, and the lack of need for it by TVA would be the event that would necessitate and justify the cancellation of the contract. The essential purpose of section 7.07 was to provide a method of measuring damages if cancellation should occur, as it did, before the plant was built and put in operation.

[fol. 326] We further think that the plaintiff's ~~argument~~ that the condition upon which the Government might lawfully cancel the contract, with a defined and limited liability for damages, was a condition which it could insist upon, or

waive, at its election, and that the Government cannot elect to be a wrong-doer, an unjustified contract breaker, in order to gain some real or supposed advantage from its assumed turpitude, is a valid argument.

If the parties had foreseen what in fact occurred, and had covered that occurrence by an agreement specifically and unquestionably applying to the events that occurred, as to how to measure the damages, we do not see how the Government could have urged that it should pay less for a wrongful cancellation than for a rightful one. That much, at least, may be said for the fairness of the plaintiff's contention. In any event, the measuring of damages for the breach of a contract which is to be performed over many years, here 25 years, is a speculative and unsatisfactory task. It is not unnatural that a court, in such a case, would wish that the parties had agreed upon a formula which would permit the damages to be measured by arithmetic, rather than by speculation and prophecy. When the parties have in fact agreed upon a formula readily applicable to the situation at hand, though they did not agree to its application to that exact situation, we think a court has the right to make use of the formula, if to do so seems fair to the court. In short, we do not think that one of the parties has a right to require a court to measure damages by a hard and unsatisfactory method, when that party has agreed to an easier and more satisfactory method for a closely comparable situation.

The language of the second paragraph of section 7.07 of the contract, quoted above, is our guide as to what items should be included in the plaintiff's recovery. It was at all times during the negotiation contemplated that the sponsors were to form a new corporation which would sign and perform the contract. The expenses which the sponsors paid or became obligated to pay were proper charges against the new corporation, the plaintiff, and are therefore proper subjects of recovery by the plaintiff. The expenditures made and obligations incurred by the plaintiff after its incorpora- [fol. 327] tion, in connection with the negotiation of the contract, its performance, and the mitigation of damages after its cancellation are recoverable. The counsel fees and expenses incurred by the sponsors are not vulnerable on the ground of duplication of services. It was natural that each sponsor should have the advice of its own counsel with re-

gard to this important venture. The costs of administrative and court proceeding engaged in for the purpose of obtaining the necessary regulatory approvals is includible. Interest at the legal rate on the money invested by the sponsors in the stock of the plaintiff, computed to the date of termination of the contract, is a recoverable item, according to the language of section 7.07 of the power contract and of section 4.02 of the "interpretative memorandum."

Counsel fees and other expenses incurred in preparing for and prosecuting the instant litigation may not be recovered. In paragraphs 19 and 22 of its petition, the plaintiff says:

> The plaintiff will also incur additional expenses prior to the satisfaction of the judgment herein, the amount of which will be supplied by amendment hereto.

The parties stipulated at the trial that, with regard to post-petition claims, only the question of liability would be presently decided, and the amount of the recovery, if any, would be determined in further proceedings. Expenditures made and obligations incurred after the filing of the petition, incident to the termination and settlement of commitments made in connection with the making and performance and termination of the contract, are recoverable.

The claims asserted on behalf of plaintiff and several of the use-plaintiffs for "compensation for the loss of the use of their money represented by their respective claims" are not recoverable. These claims amount to a request for an allowance of interest on the judgment awarded, and since neither the Power Contract nor any applicable statute provides for such an award of interest, none is recoverable in this action. 28 U.S.C. § 2516. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585.

We conclude that the plaintiff is entitled to recover on the following claims in the amounts indicated:

[fol. 328]

Claim	Finding	Amount claimed	Amount allowed
Dickmann-Pickens-Bond Construction Co.	210	$14,553.03	$14,553.03
J. A. Jones Construction Company	212	143,160.33	[1] 143,160.33
Pandick Press, Inc.	213	38,338.76	38,338.76
Reid & Priest	214	7,097.12	7,097.12
House, Moses & Holmes	215	7,500.00	7,500.00
Arthur Andersen & Co.	216	16,469.66	16,469.66
Middle South Utilities, Inc.	217	4,651.86	[2] 3,032.11
The Southern Company	218	29,391.29	[3] 21,147.45
Arkansas Power & Light Co.	219	7,484.09	7,484.09
First National City Bank of N. Y.	220	500.00	500.00
White & Case	220	500.00	500.00
Mississippi Valley Generating Co.	221-230	618,658.07	[4] 616,158.76
Ebasco Services, Inc.	231	570,727.59	[5] 565,028.02
Cahill, Gordon, Reindel & Ohl	233-235	235,198.76	[6] 232,491.75
Winthrop, Stimson, Putnam & Roberts	236-238	104,128.67	[7] 103,296.63
Willkie, Owen, Farr, Gallagher & Walton	239-240	75,787.85	75,787.85
Milbank, Tweed, Hope & Hadley	241-242	15,000.00	15,000.00
Total amount allowed			1,867,545.56

[1] This amount includes $11,027.79 for the benefit of Oman Construction Company.

[2] There is disallowed $1,619.75 representing an unnecessary expenditure for transcripts.

[3] Payments to Southern Services for salaries, overhead and travel expenses of its personnel in the sum of $2,446.55 in connection with the April 10, 1954, proposal to AEC and also in the amount of $2,999.28 in connection with negotiating the Power Contract, are disallowed as coming within the categories of unreimbursable expense defined in the interpretative memorandum set forth at the end of finding 218. There is also disallowed $2,798.01 as an unnecessary expenditure for transcripts.

[4] There is disallowed $2,500.00 representing the value of the sand deed acquired by plaintiff.

[5] There are deducted and disallowed $3,239.15 and $1,506.42 because of plaintiff's failure to show that Ebasco was not required to absorb these expenses. There is also disallowed $960.00 because of plaintiff's failure to show that this item was a true liability.

[6] There is disallowed $2,707.01 representing 63½ hours spent in preparing the petition in this lawsuit.

[7] There are disallowed: $264.74 representing 7 hours at an average hourly rate of $37.82, which time was spent in preparing the petition in this lawsuit; $567.30 representing 15 hours spent on the proposal to TVA.

Judgment will be entered for the plaintiff in the above total sum, said sum representing the amounts found to be due the plaintiff on a portion of its claim. The amount due the plaintiff on the remaining portion of its claim will be determined in further proceedings pursuant to Rule 38(c).

It is so ordered.

LARAMORE, *Judge*, and ALBERT V. BRYAN, *District Judge*, sitting by designation, concur.

ALBERT V. BRYAN, *District Judge*, concuring:

The very law points now mooted to defeat the contract as unauthorized were originally vouched by the Government to conclude it. These remain unbowed. Besides, admittedly every act now pleaded to impugn the contract, as the opinion of the court also well recounts, was "begun, continued and ended" in good faith and in the full knowledge of the Government. In truth there was no imposture.

[fol. 329] To vitiate the contract as a potential imposture, the Government would invoke the biblical precept, embedded in public policy and statute, denouncing duplicity in agency. With this doctrine it would first condemn its own agent for pursuing aboveboard the honest directions of his Government. Then the principle would be interposed against the plaintiff notwithstanding that the Government's agent was never the agent of the plaintiff or ever "interested" in the plaintiff's "pecuniary profits or contracts"—notwithstanding, too, that the Government gave the plaintiff no choice but to deal through this agent. All this the court's opinion patly demonstrates. Certainly the principle is not so salutary it must be vindicated by visitation upon an unoffending contractor.

A covenant of a contract is a pledge—something "more than a promise, and lesse than a Oath"—to perform or respond in damages. The bargain good or bad, the United States faithfully keeps her covenants.

REED, *Justice* (Ret.), sitting by designation, dissenting:

The court finds in *Muschany* v. *United States*, 324 U.S. 49, 66–67, a precedent for upholding the validity of the present contract. Corruption as a basis for the invalidation of a government contract is considered neither in the *Muschany* case nor in this case. Both cases turn on whether the conduct was in violation of public policy and therefore void.

The court cites, in support of its position, the conclusion reached in the *Muschany* case that a contract to be invalid as a violation of public policy must be "so menacing as to prohibit such contracts regardless of the effect in a particular case." The *Muschany* case calls for maintenance of contractual obligations of the United States unless a dom-

inant public policy or a statutory enactment declares its invalidity.[3]

In the *Muschany case*, the Government purchased land through its own agent by a contract that allowed the agent cost plus a fixed fee, a method specifically approved by a statute, The National Defense Act of 1940.[4] In this present case now under consideration, there is a dominant public policy against a negotiator with a conflict of interest which [fol. 330] is embodied in a statutory enactment punishing such conduct as criminal.[5]

In such situations a contract made in violation of the criminal statute is unenforceable. Accepting the argument of the majority that no improper motive influenced any action of Mr. Wenzell does not in our opinion make the Mississippi Valley contract valid. If contracts are made in violation of positive law, they are unenforceable.[6]

The Supreme Court of the United States approved that rule many years ago in the *Bank of the United States* v. *Owens*, 2 Peters 527. There the charter of the bank provided a limitation of six percent upon its loans or discounts. It was held that more was taken. The charter, however, did not provide that a contract for a greater sum was void.

---

[3] *Muschany* v. *United States, supra.*

[4] 54 Stat. 712; *Muschany* v. *United States, supra,* pp. 66-67.

[5] See note 7, *infra.*

[6] Williston on Contracts (Rev. Ed., 1938), § 1763:

"For the protection of the public, or for purposes of taxation, or for both reasons, many statutes are enacted forbidding certain bargains and sales either altogether or unless certain statutory regulations are complied with. There can be no doubt that if a statute directly prohibits a contract or sale it cannot be enforced by the parties to it, and the same is true if the formation or performance of the bargain is declared to be a crime. The imposition of a penalty is at least prima facie an implied prohibition of the transaction to which the penalty attaches. On the other hand, even though no penalty is imposed, the transaction may nevertheless be invalidated." The text is supported by numerous cases. See *Berka* v. *Woodward*, 125 Cal. 119; *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 334.

The court declared the answer was obvious; an unlawful contract could not be enforced, and decreed no recovery.

Again in *Miller* v. *Ammon*, 145 U.S. 421, recovery on a bill for a sale of liquor without a valid license was denied, the Supreme Court holding:

> The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. * * * And in *Harris* v. *Runnels*, this court, after noticing some "fluctuations in the course of decision, and observing" that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so," added: "It is true that a statute, containing a prohibition and [fol. 331] a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." Pages 426–27.[7]

This court has strongly supported the application of the rule against the validity of contracts where an officer or agent of the United States participates in their adoption. In *Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258, a suit on an implied contract to pay for the Government's use of a patent was dismissed on the ground of an interest in the contract by the Public Printer responsible for

---

[7] The Restatement of the Law of the American Law Institute is in accord. It recognizes, too, that where refusal to enforce or rescind a bargain would produce a harmful effect on parties for whose protection a statute was passed, the illegal contracts may be enforced. A.L.I. Contracts, § 580 and 601.

its use. This court said, page 271, referring to section 1783, Revised Statutes, the forerunner of 18 U.S.C. § 434, the section the Government relies on here:

> * * * section 1783, *Revised Statutes*, forbids any person directly or indirectly interested in the pecuniary profits or contracts of a commercial corporation acting as an officer or agent of the United States for the transaction of business with such corporation. It is not clear that by the alleged transfer to his sister-in-law of his stocks in this and other concerns Mr. Benedict intended to deprive himself of all ownership therein. Certainly the statement that his purpose was to give the full benefit of the stock in plaintiff corporation to his brother in case the latter was able to repay him the advances he had made is inconsistent with an absolute transfer of his stock to his sister-in-law, because, if it were hers, he could not give his brother the benefit of it, even if the advances were repaid. Certain it is that Mr. Benedict regarded himself as equitably entitled to compensation out of the corporation's receipts, and he says as much.

See *Rankin* v. *United States*, 98 C. Cls. 357, which is in accord. Compare *Architects Building Corp.* v. *United States*, 98 C. Cls. 368, 380, where a ministerial act, signing a contract, was held permissible under Revised Statutes 1783. This court said, page 380:

> [fol. 332] We believe this is one of the exceptions to the general rule. It was not the intention of the statute to cover a case of the nature of the instant case where the action of the President of the Corporation, who happened to be an agent of the Government, was solely for the purpose of officially signing the lease or voting on its acceptance, and where he took no part in the negotiations and derived ~~no~~ benefit, his actions being purely ministerial and in no way detrimental to the interests of the United States and transcended no public policy.

It appears that the English courts apply the same rules as to contracts in violation of statutes. In *Barton* v. *Piggott*, L.R. 10 Q.B. (1874) 86, a surveyor of highways, forbidden by statute to have an interest in a contract for work or

materials, unless a license in writing was first obtained, and his accounts for such work subsequently approved by the appropriate justices who were authorized to approve beforehand. It was held unlawful to allow accounts declared illegal by another provision of the statute.

Pollock on Contracts (13th ed.) 275, phrases the present English rule in these words:

> (b) The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.
>
> These rules are established by the case of *Bensley* v. *Bignold*, which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute. It was argued that his right under the contract was untouched by the Act, which contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best, J. said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.
>
> Thus, for example, by the Court of Exchequer:
>
> "Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."
>
> [fol. 333] It is needless to discuss the "policy of the law" when it is distinctly enunciated by a statutory prohibition.[s]

Such unanimity of view as to the invalidity of contracts that violate specific statutory prohibitions brings us to an

[s] *Bensley* v. *Bignold* (1882), 5 B. & Ald. 335; 24 R.R. 401.

examination of the statute here in question. It appears below.[9] It was enacted to meet a specific menace to the fair negotiation of federal contracts and is akin to other statutory requirements to insure against corrupt influences, such as the requirement for statutory authority in the contracting officer or prior advertisement, or those that bar fiduciaries from profiting from dealings with their *cestui que trust*.[10] This section of the Code originated as Sec. 8 of An Act to prevent and punish Frauds upon the Government of the United States. It was enacted March 2, 1863, 12 Stat. 696, as a result of prolonged investigation and reports to Congress on the war contract frauds of that era.[11]

Government contracts are not only large in number and value but are negotiated by numerous contracting officers of varying ability and experience. The statutes for the protection of the Government are not because of frequent fraudulent influences but are to guard against the situations that may arise. They should be fairly interpreted so as to carry out their purpose to protect against a tendency to overreach the Government but are not to be extended to situations "not clearly within its terms."[12] In such cases as we have before us, it must be plain not only that, as we have shown above, the law makes illegal contracts that the statutes forbid, but that the questioned actions violate the statute.

---

[9] 18 U.S.C. § 434:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[10] The Floyd Acceptances, 7 Wall. 666; *United States* v. *Ellicott*, 223 U.S. 524, 543; *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80; 332 U.S. 194. See Federal Conflict of Interest Statutes, 65 Harv. L. Rev. 955, 957.

[11] H.R. Rep. No. 2, 37th Cong., 2d Sess.; Government Contracts, and Supplement.

[12] *United States* v. *Chemical Foundation*, 272 U.S. 1, 18.

Mr. Wenzell acted as an agent of the United States for the transaction of business with the business entity, which [fol. 334] transactions immediately resulted in a contract with the Atomic Energy Commission for the construction of generating facilities. The entity became the Mississippi Valley Generating Company. The words, "such business entity," were inserted in § 434 to insure that all types of business arrangements were included.[13] The fact that Mr. Wenzell received no salary from the Government but only reimbursement of expenses does not affect our conclusion that he was employed and acted as an agent of the United States in analyzing the cost of TVA's production of electricity for the Budget Bureau. This was to be compared with the cost of generation by private operators. To accomplish this analysis, Mr. Wenzell was furnished detailed information as to TVA operations, including costs.[14] The knowledge thus acquired was passed on to First Boston, his employer and a prospective agent for the sale of the private securities of the sponsoring company, in the fall of 1953, by Mr. Wenzell, although the Bureau had forbidden such disclosure as it was a confidential Bureau document. Finding 35. With First Boston's previous experience in a similar transaction with Ohio Valley Electric Corporation, Mr. Wenzell's company was well equipped to handle the financial affairs for any builders of the needed generating plant. Mr. Wenzell submitted his report to the Bureau of the Budget September 20, 1953. Finding 29.

Shortly thereafter steps were taken by the responsible officials of AEC and the Budget to negotiate with private power companies for furnishing the needed electricity. The Government considered it desirable to recall Mr. Wenzell for assistance in the negotiation. He was recalled and came in the middle of January 1954, as a Budget Bureau consultant, and worked for it in and out of Washington until April 3, 1954. Finding 106. His expenses for this period were paid sometimes by the Government, sometimes by First Boston. Finding 99. Mr. Wenzell consulted frequently in this period with the private sponsors of the construction plan as a representative of the Budget Bureau to work out a plan for

---

[13] H.R. Rep. No. 304, 80th Cong., 1st Sess., Sec. 434, A32.

[14] Findings of Fact 24 through 35, particularly 30.

private construction of the facilities. He was the only rep-[fol. 335] resentative of the Budget Bureau at an important meeting on January 20, 1954. Finding 50. Various meetings followed concerning the sponsors' proposals in which Messrs. Wenzell and Dixon, an active sponsor of Mississippi Valley, participated. Findings 50–67. The negotiators submitted a proposal to the AEC on February 25, 1954. This proposal was analyzed by the Budget Bureau, and Mr. Wenzell participated in the work. The conclusion was reached that the sponsors' proposed cost was too high.[15] The sponsors revised their cost estimates after various contacts with Mr. Wenzell. The Budget asked him to see Seal, a sponsor's representative, about new figures. He did so. Finding 84. He discussed the sponsors' offer with the sponsors' representatives, Messrs. Dixon and Yates, at a meeting with a senior officer of First Boston on March 10, 1954. Finding 86. During the period between the first and second proposals, there were several telephone calls and meetings between Wenzell and the sponsors' representatives concerning these proposals.[16] Later, at a general discussion at which Mr. Wenzell was present, the sponsors were told they were close "to submitting acceptable figures." Findings 97–98. Their formal proposal dated April 10, 1954, was made to the AEC on April 12 at Washington. This was done after a conference that morning with First Boston over the cost of the necessary construction money, some one hundred million dollars, at which Mr. Wenzell and other First Boston officials, including the Chairman of the Executive Committee, were present. Finding 107. On that date "Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal." Finding 108. The April 10th proposal was accepted by AEC as a "Satisfactory basis" for the negotiation of the contract finally concluded on November 11, 1954. Findings 129–131.

These facts establish, we think, that Mr. Wenzell was an employee of the United States participating in the transactions that culminated in the contract in question within the terms of § 434 of Title 18, U.S. Code. But before the con

---

[15] Findings 60–100, particularly 89–90.

[16] Findings 87, 89, 90, 92, 94.

[fol. 336] tract should be declared unenforceable under the section in question, it must also be established that the agent was "an officer, agent, or member of, or directly or indirectly interested in the pecuniary profits or contracts" of the business entity with which he transacts business for the Government, that is, the sponsors who became the Mississippi Valley Generating Company. We think he was directly interested, within the meaning of the statute, in the contract of Mississippi Valley with AEC. His negotiations were with the sponsors of the business entity that made that contract.

The majority opinion, we think, misjudges the thrust of the statute. It argues that it is not shown that First Boston had an interest in the contract as financial agent or otherwise until after Wenzell's governmental employment had terminated. Assume that fact as true. The defense to this suit is not that First Boston violated § 434, but that Wenzell did.

The statute covers a person, not an officer, agent, or member of the Mississippi Valley business entity who is indirectly interested in the contracts of that business entity and acts as an agent of the United States for the transaction of business with such business entity. This covers Mr. Wenzell's situation.

Mr. Wenzell was a Vice President of First Boston receiving a salary and a bonus based upon the amount of business he brought the firm. Finding 125. If solely or partially through his contacts with the officials of Mississippi that business entity was induced, persuaded, or found it convenient to employ First Boston as its agent to "place the debt" of Mississippi with bond buyers, Mr. Wenzell could confidently expect recognition from First Boston.

The exact date of the contract between the Mississippi Valley business entity and First Boston on financing does not appear in the record. It was apparently at the meeting in Boston on April 12, 1954, to consider the submission of the sponsors' new proposal that arrangements were made. Findings 116 and 124. The retainer facts appear in detail in Findings 107-128.

The action of First Boston in refusing a fee for its services in the loan was predicated on the advice of counsel as to [fol. 337] the questionable legality of Mr. Wenzell's dual role as government negotiator and official of the financial

agent of Mississippi V[illegible]y. First Boston, at an executive committee meeting, October 21, 1954, decided not to accept compensation for its services, except out-of-pocket expenses, because the company thought the financing had flowed directly from the offer of Mr. Wenzell's services to the Budget by First Boston's President, Mr. Woods. Finding 117. It *had been determined* in May preceding that the fees would be split 60% to First Boston and 40% to Lehman Brothers. Finding 115. First Boston's fee for the OVEC financing, a transaction akin to this one was $150,000, plus $20,000 expenses. Finding 27. Apparently the question of waiving a fee came up in First Boston's Executive Committee meeting of July 1, 1954. No action was then taken. Until November 17, 1954, after the contract between Mississippi Valley and AEC was signed, neither Lehman Brothers nor any representatives of the sponsors "had notice of First Boston's attitude regarding the charging of a fee." Finding 117. But whether the financing was to be without compensation or not, First Boston considered it a valuable feather in its cap to be in the "senior position" of such a large financial transaction. Finding 113.

The problem raised by Mr. Wenzell's activities in connection with his representation of the United States in its negotiations with Mississippi was not new on July 1, 1954. Both the First Boston and Mississippi Valley sponsors had had the matter brought to their attention. Prior to the time the first proposal of the sponsors was submitted to the Budget and AEC, February 25, 1954, the sponsors' counsel advised Mr. Dixon of the possible conflict of interest because of Mr. Wenzell's representation of the Government, if First Boston was asked to handle the financing. Mr. Dixon immediately spoke to Mr. Wenzell about the matter. Finding 68. A similar warning also came to Mr. Wenzell from members of the Budget Bureau staff during Wenzell's participation in the negotiations concerning the second offer of the sponsors. Finding 76. Mr. Wenzell spoke to Mr. Hughes of the Budget about the possible conflict question raised by the sponsors of Mississippi Valley. He advised him to talk to [fol. 338] counsel and then to the Director of the Budget. Mr. Wenzell then talked with Mr. Coggeshall, the President of First Boston who told Wenzell to take it up with First Boston's counsel, Sullivan & Cromwell of New York. On

February 26, 1954, the day after the sponsor's first proposal to the AEC, Mr. Wenzell was advised by Sullivan & Cromwell to resign "forthwith and in writing" from the Budget Bureau. He was "also advised that if the proposal was later accepted and First Boston was requested to handle the financing the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee." Finding 72. Mr. Wenzell did not resign immediately, nor ever in writing, but continued to negotiate for the Government on the new contract with the sponsors and First Boston, as shown above. No explanation has been offered of the failure of Wenzell to resign promptly after his attorney advised him to do so on February 26, 1954, nor as to why, after being advised of the possible charge of conflict of interest, as set out in unchallenged findings 78 and 79, he continued to attend meetings in the Budget Bureau where the sponsors' offers to the Government were discussed and analyzed. For us these facts shown a complete indifference to an obvious conflict of interest in violation of 18 U.S.C. § 434.

The steps taken by Mr. Wenzell between the first unsatisfactory proposal of the sponsors of the Mississippi Valley contract and the proposal that ripened into the contract, ~~February 25 to April 12, 1954~~, appear to us to have been taken when his interest in securing the financial representation of the sponsors by First Boston was direct, positive, and looked useful to his financial advantage as helpful to his employer, First Boston. The acts were carried out with full advice as to their questionable character. They violated the words of the statute. *Cf. Waskey* v. *Hammer*, 223 U.S. 85.

That statute was intended to protect the public against participation in negotiations by civil servants with interests conflicting with those of the Government, to prevent abuses, and inspire confidence. The record shows that Mr. Wenzell's study of TVA operating costs and practices, and his [fol. 339] subsequent association with and advice to the sponsors of the Mississippi Valley contract negotiations were with the knowledge and approval of the Budget Bureau. This, we think, does not validate the contract. The Government has been fortunate in securing the services of many able Americans who serve without compensation but

so long as they retain an interest in their respective companies, they cannot, under the statute, negotiate contracts with them for the Government. He may advise the Government as to business matters but he cannot act as an agent of the Government for the transaction of business with any business entity in which he has an interest. This is the public policy the criminal statute lays down.

We have here no problem of unjust enrichment of the Government without payment for the benefits furnished it by the Mississippi Valley Generating Company. To now say that the contract is invalid may seem harsh since the evidence does not disclose a payment or an express promise of direct financial benefit to Mr. Wenzell or the First Boston, but if the statute in question is to perform its intended function in the protection of the Government against prohibited actions that might influence contracts by public agents with private connections, courts must carry out the legislative purpose. The Government has vigorously defended this suit to recover damages for breach of contract on the ground of the invalidity of the agreement. We think the Government's position on that ground of public policy is well taken and the petition should be dismissed.

Jones, *Chief Judge*, dissenting:

I agree with the dissenting opinion of Justice Reed, but would add the following:

I would further emphasize the fact that the invalidity of the Power Contract does not rest upon the showing that it was entered into in bad faith, or corruptly, or for the purpose of perpetrating a fraud upon the Government. Nor do we have a criminal prosecution in which it is incumbent upon the defendant to establish criminal intent.

Rather, the issue is based on a principle older than this country itself, that no man who works for the Government may at the same time transact business with an entity in [fol. 340] which, directly or indirectly, he has a pecuniary interest. The maxim that a servant cannot faithfully serve two masters is an ancient one and is grounded on the frailties of human nature. The warning it carries is proven each day by experience. Where loyalty is divided, the devotion and singleness of purpose demanded of its fulfillment is

missing. The maxim has special significance for the Government because of the high standards of ethical conduct which it exacts from its employees.

For many years Congress has been concerned with the possible evils resulting from a compromise of this fealty by Government employees. To guard against the damaging effects of fraud in its various forms—by striking at one of its prolific sources—Congress as early as 1862 enacted a "conflict-of-interest" statute. 12 Stat. 577. To make certain that it covered any agent of the Government, Congress amended the law on February 25, 1863. 12 Stat. 696. Since that time this law has undergone little modification. The policy it sanctions is one seeking to remove the temptation to violate the trust relationship of Government service. *Michigan Steel Box Co. v. United States*, 49 C. Cls. 421; *Rankin v. United States*, 98 C. Cls. 357. The legislation is thus directed at a temptation to commit wrong. Not the *fait accompli*.

The application of the statute is not defeated by a failure to establish deliberate fraud or corruption on the part of the servant who feels, or might feel, the nudge of interests adverse to those of the Government. Indeed, the contract may be disaffirmed without a showing that the Government suffered actual damages as a result of the activities of the employees concerned. The purpose of the statute, broadly phrased to curb evasion, is to prohibit the transaction of Government business by its employee with a business entity in whose profits or contracts he has a pecuniary interest whether it be direct or indirect.[17]

Did the activities of Adolphe H. Wenzell fall within the terms of 18 U.S.C. 434? I think so. To me it is inescapable in the light of the undisputed facts in this case that Wenzell was employed to act and did act as an agent of the United [fol. 341] States for the transaction of business with the Dixon-Yates group, the business being the prospective contract between the Government and the entity to be organized by the sponsors for that purpose.

The assertion that the numerous activities conducted by Wenzell to facilitate the contract sought by the sponsors were not the acts of an "agent of the United States for the

[17] 18 U.S.C. 434.

transaction of business" does not comport with the facts. The record discloses what occurred in some but not in all the meetings and telephone calls between Wenzell and the Dixon Yates group. At least we know that he procured and furnished to the Budget Bureau and to the sponsors information on the probable cost of interest on money to be borrowed by the plaintiff. Early in the inception of the project and before the sponsors' first proposal was submitted, it was well recognized by the officers of the Government, by the sponsors, and by Wenzell as well, that the interest rate on money borrowed by the utility company with whom the Government would contract would be an important element in the total cost to be paid by the Government. Findings 45 and 57. Therefore, the very matter to which much of Wenzell's effort was devoted was not only a part of the business being transacted with the Government but a vital element in it.

The majority seems to believe that the "interest" of Wenzell in the contract of the sponsoring group was so remote that it would not justify the invalidation of the Power Contract, but I view the facts differently. It must be remembered that Wenzell was not drafted by the Government. On the contrary, his employment as a consultant for the Budget Bureau was a direct outgrowth of the telephone calls made by the chairman of the board of directors of First Boston to Dodge and the resulting conference between the two men on May 11, 1953. Finding 24.

There is not the slightest doubt that the Dixon Yates group was fully cognizant of the dual position of Wenzell. In fact, they were disturbed about it to the extent that they suggested that he resign in writing, but he did not do so, and they also knew that he continued to have an interest in the program. Could they have been more interested in avoiding the appearance of evil rather than the evil itself? [fol. 342] When large projects are involved there is always a tremendous drive for the privilege of handling and financing. It is highly competitive as it should be in a free economy. But this very fact makes it all the more important that the Government permit no unfair advantage as between competitors. They should all be on the same dead level of equality. This is an added reason for not permitting any interested party's serving in a dual capacity.

It is argued that Wenzell had no connection with the performance contract, but only with the financing. But they are as closely linked as the law of supply and demand. Very few one hundred million dollar contracts can be performed without financing, and the financing of a large contract is an immensely profitable undertaking. Does anyone doubt that First Boston and Wenzell expected to finance the contract, and that Dixon Yates expected them to do so?

Because of First Boston's experience in arranging for the financing of the project for the Ohio Valley Electric Corporation, the sponsors were well aware that if a contract resulted from their proposals, there was a strong probability that First Boston would be employed to handle the financing, and we may infer from the facts and circumstances in the record that this probability was equally well known to First Boston and Wenzell.

As a vice president of First Boston, he was entitled to a bonus on the business he brought to the firm and was greatly interested in a successful and expeditious closing of the Dixon Yates contract, not only because of the fee First Boston would earn as financial agent but also because of the prestige it would gain in handling a transaction of such magnitude. While the record does not show that he served as a consultant in the Budget Bureau after April 3, 1954, he stayed long enough to learn that the sponsors' revised cost estimates were being favorably viewed by the Government and that a new proposal based on the revised figures would receive serious consideration. In addition, he did not regard his services with the Government as terminated until April 10, 1954, by which time the sponsors had drafted the second proposal and permitted him to review the provision in which he was most interested—the provision relating to interest rates on money to be borrowed by plaintiff.

[fol. 343] The representatives of the sponsors were not novices in the handling of the proposed project with the Government. They were experienced businessmen who dealt in big figures and knew their way around. Clearly they were aware of the tremendous advantages of having a "friend on the inside." Otherwise, it is difficult to understand why they consulted Wenzell so frequently.

Finally, the argument that Wenzell's services with the Budget Bureau had no influence whatever in the retainer of

First Boston as financial agent is, it seems to me, completely refuted by the statement of the chairman of the board of First Boston. He declared that the firm's decision not to charge the sponsors a fee was dictated by the fact that the retainer of First Boston by the sponsors had resulted directly from his conversation with Dodge in May 1953, when Wenzell's services were offered to the Budget Bureau. Finding 117.

In the conclusion reached by the majority, considerable reliance is placed on the Administration's unflinching and hurried insistence upon a contract with a private utility company; the diligence with which Wenzell pursued his duties in the Budget Bureau; the sponsors' awareness of Wenzell's duality and the disclosure of this situation to the Budget Bureau; Wenzell's departure before the actual drafting of the contract began, and the fairness of the resulting Power Contract.

This conclusion of the majority seems to stem from an understandable desire to avoid a harsh result in this case, but the difficulty I find with the majority decision is that the policy so clearly expressed in 18 U.S.C. 434 leaves no room for equitable considerations. To my mind, the policy means that in a situation such as that revealed in this case, the tendency or likelihood of a disadvantage to the Government invalidates the Power Contract. I cannot join in chipping out exceptions to a policy so forceably laid down by Congress nor agree that the conflict of interest statute means little when it says much. If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions.

[fol. 344] FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Wilson Cowen, and the briefs and argument of counsel, makes findings of fact as follows:

CONTENTS

VIII. Damages—Continued Findings

[fol. 345]

I. The Contract

A. General

1. Plaintiff herein is Mississippi Valley Generating Company (hereinafter called MVG), a corporation organized under the laws of the State of Arkansas. Seventy-nine percent of the issued and outstanding stock of MVG is owned by Middle South Utilities, Inc. (hereinafter called Middle South), and the remaining 21 percent is owned by The Southern Company (hereinafter called Southern). Middle South and Southern are sometimes hereinafter referred to as the sponsors.

2. This suit was brought by MVG on behalf of itself and for the use of and benefit of 24 parties referred to as use-plaintiffs. The suit is based upon a contract, hereinafter called the Power Contract, entered into between MVG and defendant, acting through the Atomic Energy Commission (hereinafter called AEC), under which MVG agreed to construct and operate a steam electric generating station and related facilities at West Memphis, Arkansas. The Power Contract and certain supplemental agreements were duly executed and delivered on November 11, 1954. The contract and annexed interpretative and explanatory document [fol. 346] were received in evidence as plaintiff's exhibits 2-8, 11, and 15. These exhibits and ~~all~~ other exhibits referred to herein are by such references incorporated in these findings.

3. The Power Contract resulted from the following:

(a) On April 10, 1954, Middle South and Southern submitted to the AEC a proposal wherein the sponsors agreed to organize a new corporation (MVG), which would construct and operate the plant and other facilities in accordance with the terms of the proposal. For Middle South the proposal was signed by its president, Edgar H. Dixon, and for Southern by J. M. Barry, chairman of Southern's executive committee:

(b) on June 30, 1954, AEC wrote the sponsors that the proposal constituted a satisfactory basis for the negotiation of a definitive contract and that AEC was ready to begin negotiations; and

(c) on July 7, 1954, the parties began negotiations which terminated with the signing of the Power Contract on November 11, 1954.

4. Middle South is a public utility holding company which owned 100 percent of the stock of the Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company, and approximately 96 percent of the common stock of New Orleans Public Service Company. Dixon was a director of each of these four subsidiaries of Middle South, and he also became president of MVG when it was organized.

Southern is a public utility holding company which owned 100 percent of the stock of Alabama Power Company, Georgia Power Company, Mississippi Power Company, and Gulf Power Company. Eugene A. Yates, at all times material to this action, was chairman of the board of directors of Southern.

5. Section 8.22 of the Power Contract provided in part as follows:

> *Effective Date:* The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to the Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed [fol. 347] during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

6. Items (3) and (4) of Section 8.15 of the Power Contract, referred to in section 8.22, provided as follows:

> The obligations of the parties hereunder shall be subject to the following:
>
> * * * * *
>
> (3) the receipt by the Company of an opinion of the General Counsel to the AEC to the effect that the AEC has power and authority to execute this contract and the

undertakings herein described and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the persons executing and delivering this contract on behalf of the AEC have full power and authority to do so; and

(4) the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress.

7. (a) The opinion of the General Counsel to the AEC dated November 11, 1954, was rendered and delivered to plaintiff.

(b) On November 13, 1954, the Joint Committee on Atomic Energy adopted a resolution waiving the 30-day period specified in Section 164 of the Atomic Energy Act of 1954. However, as is more fully set forth in findings under the heading of "The Waiver Defense", the Joint Committee on Atomic Energy adopted a resolution on January 28, 1955, revoking the waiver.

(c) The opinion of the Comptroller General of the United States was embodied in two opinion letters dated October 5, 1954 and December 13, 1954, respectively, and copies of these were delivered to plaintiff. The second letter was delivered on December 17, 1954.

[fol. 348] 8. Since December 17, 1954, the date of the delivery of the second opinion of the Comptroller General, was the last of the dates specified in section 8.22, the Power Contract became effective on December 17, 1954.

9. Because of the time which had elapsed prior to the execution of the Power Contract, a letter agreement was entered into between MVG and defendant on November 11, 1954, stating that if by February 15, 1955, the effective date of the contract had not occurred as provided in section 8.22 and valid regulatory approvals necessary in connection with the issuance of MVG's capital stock had not then been obtained,

either MVG or the United States might terminate the Power Contract by written notice without liability of either party to the other. By an exchange of correspondence during the period from February 11 to February 28, 1955, it was agreed that those provisions of section 8.22 of the Power Contract that were covered by the letter agreement had been satisfied and that the Power Contract was effective. As a result, the letter agreement was no longer operative.

B. Performance by Plaintiff

16. Subsection 1 of section 8.15 of the Power Contract provided that the obligations of the parties would be subject to the receipt by plaintiff of regulatory approvals in form and substance satisfactory to it and necessary to enable it to perform its obligations under the contract or necessary to enable plaintiff to issue its equity and debt capital. On November 17, 1954, six days after the execution of the Power Contract, plaintiff filed with the Securities and Exchange Commission (hereinafter called SEC) an application for approval of MVG's equity financing. On February 9, 1955, after extended hearings in which there was vigorous opposition to plaintiff's application, the SEC entered an order authorizing plaintiff to issue and sell to the sponsors capital stock in the amount of $5,500,000. On March 14, 1955, this order of the SEC was appealed to the Court of Appeals for the District of Columbia, as more fully described herein under the heading of "Lack of Regulatory Approvals Defense."

On April 22, 1955, plaintiff filed an application with SEC for permission to issue and sell bonds and to make bank [fol. 349] loans. As of July 11, 1955, when defendant notified plaintiff that the Government proposed to terminate the contract, testimony had been closed in this proceeding before the SEC, plaintiff's proposed findings having been filed on June 20, 1955. In the hearing, plaintiff encountered strong opposition from the same parties who had opposed its application in the equity proceedings and had taken the appeal to the Court of Appeals. The issues raised by the opposition were substantially the same both proceedings, and in view of the SEC order in the equity proceedings, plaintiff could reasonably expect favorable action from SEC on its application to sell bonds and make bank loans. However, because

of the opposition encountered and the appeal referred to, it was also apparent that there would be some delay, to an extent not ascertainable, before authority would be finally granted to plaintiff to issue and sell its debt obligations.

11. The condition of subsection 2 of section 8.15 of the Power Contract was the execution and performance by institutional investors and banks of contracts and commitments providing for the sale to such investors of plaintiff's debt capital in a form satisfactory to plaintiff. Bond purchase and bank loan agreements in a form satisfactory to plaintiff had been entered into with insurance companies and banks before the Power Contract was terminated. Plaintiff advised AEC of this action and sent it copies of the bond purchase and loan agreements.

12. Both the bond purchase agreement and the bank credit agreement required that, at the time of each borrowing thereunder, an opinion of counsel be furnished to the effect that plaintiff had "obtained all orders, certificates, approvals, authorizations or consents of the Securities and Exchange Commission" to enable it to issue and sell bonds, or to borrow money and issue notes, as the case might be, and that "such orders, certificates, approvals, authorizations and consents are valid and are in full force and effect, the times (if any) prescribed by statutes or regulations for appeals therefrom or rehearings thereon have elapsed and none of them are the subject of any pending attack on appeal or by direct proceedings or otherwise * * *".

13. Under date of June 14, 1955, Ebasco Services Incorporated (hereinafter called Ebasco), the architect-engineer [fol. 350] employed by plaintiff to design the power plant and act as construction manager, estimated that plaintiff's cash requirements would be $6,175,000 by December 31, 1955. It was also estimated that these cash requirements would increase rapidly each month thereafter and that by the end of June 1956, plaintiff's total cash requirements would amount to $27,575,000.

14. If plaintiff had exhausted the equity capital of $5,-500,000 before the debt proceedings had been favorably concluded, it would have been necessary for plaintiff to discontinue work on the project unless (a) it could have persuaded the banks and insurance companies to waive the requirements of valid SEC approval of the debt financing, or (b)

obtained temporary bank loans until approval was secured. However, both the appeal on the equity financing and the SEC debt proceedings became moot when defendant terminated the contract. The record affords no basis for making an accurate determination as to when the debt proceedings would have been favorably concluded. A finding that plaintiff would have had or that it would not have had funds available for the construction of the plant after the date of termination, would be speculative. Plaintiff did not encounter any problem of lack of funds before the contract was terminated. Of the $5,500,000 of capital stock which the SEC had authorized plaintiff to issue and sell, plaintiff had actually issued and sold to the sponsors stock in the amount of $1,100,000. By the date the contract was terminated, plaintiff had large outstanding commitments, but it had actually spent less than one-half of the $1,100,000.

15. Although all of the regulatory approvals required under the terms of the Power Contract had not been obtained by plaintiff as of the date of termination, the evidence shows that from the date the Power Contract was signed and until it was terminated, plaintiff was diligent in its efforts to obtain all of the required regulatory approvals.

16. Before the negotiations on the contract began, the defendant had made it clear to plaintiff that the proposed power to be generated at the new plant would be needed by the fall of 1937, and during the negotiations, plaintiff was told that the first of the three units of the power plant was [fol. 351] to be in operation within 32 months after the effective date of the contract.

In section 2.01 of the Power Contract, plaintiff agreed to use its best efforts to have the three generating units of the power plant ready for commercial operation not later than 32, 34, and 36 months, respectively, after the effective date of the contract. In view of the defendant's express need for the power by the fall of 1957, and in order to meet the target dates which were known long before the Power Contract was signed, the sponsors and plaintiff began activities looking toward performance of plaintiff's obligation under what eventually became section 2.01 of the Power Contract months before that document was executed. These early activities included taking options on land which was to be the site of the plant, primary engineering work, the preparation of a

schedule of construction activities, and some exploratory work on the site.

By the end of 1954, plaintiff, through Ebasco, had made limited commitments for many of the items of equipment needed and for a construction office and warehouse.

In the early party of 1955, a construction office was opened at the site and major construction was started on June 1, 1955. By the time the contract was terminated, three of the basic construction contracts had been let and many of the purchase orders had been issued.

The record as a whole shows that at the time the Power Contract was terminated plaintiff had used its best efforts to comply with the obligation set forth in section 2.01 of the Power Contract.

17. Aside from section 2.01 and 8.15 (covered by preceding findings), there were a number of provisions in the Power Contract and in the interpretative memorandum annexed thereto which imposed affirmative obligations upon plaintiff. The defendant offered no evidence that plaintiff had failed to perform any of the obligations set forth in these provisions. The undisputed evidence establishes that at the time the defendant terminated the contract, plaintiff had performed such obligations imposed upon it by the contract in all instances where performance was timely, or that it was proceeding diligently toward performance.

[fol. 352] C. Termination of the Contract

18. Near the end of June 1955, plaintiff learned that the President of the United States had requested the Director of the Bureau of the Budget to confer with AEC and the Tennessee Valley Authority (hereinafter called the TVA) to determine whether to cancel the Power Contract because of the decision of the city of Memphis to construct its own electric generating facility, thereby relieving TVA of the obligation to furnish Memphis with power.

19. On July 11, 1955, at about 5 p.m., plaintiff was advised by telephone by the Chairman of AEC that the President of the United States had decided to order termination of the contract. On August 1, 1955, the oral notice was confirmed in a letter from AEC to plaintiff. The letter expressed the hope that it would be possible for the parties to agree on a

mutually acceptable basis for bringing the contract to an end.

20. On July 12, 1955, representatives of plaintiff met with the President of the United States, and thereafter there was a series of meetings with representatives of AEC. In compliance with a request from AEC, plaintiff supplied estimates of termination costs as of June 30, September 30, and December 31, 1955. During these meetings there were discussions about plaintiff's commitments to third parties and as to steps that could be taken to minimize the outstanding claims. Plaintiff also worked with AEC in attempted to settle some of the smaller claims. However, the representatives of AEC were unable to give plaintiff any specific instructions on actions that should be taken in connection with the termination of the contract. The AEC representatives stated that they had not received any directive regarding the matter. The post-termination discussions were broken off by AEC in October 1955, and on November 23, 1955, AEC wrote plaintiff that upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government.

21. From the date the Power Contract was executed until the letter of November 23, 1955, no representative of the defendant had indicated to plaintiff that it had failed in any way to discharge its obligations under the contract. However, [fol. 353] at the meetings between plaintiff and the AEC after the contract had been terminated, AEC reserved the question of whether the contract was invalid because of a conflict of interest. This is the basis of one of defendant's affirmative defense, the facts regarding which are set forth under the heading "Conflict of Interest Defense."

II. The Conflict of Interest Defense [1]

A. Eisenhower Administration's Power Policy in 1953 and 1954

22. It was the basic Eisenhower Administration policy on power during 1953 and 1954 that the Government would seek to have either private enterprise or local communities provide power generating sources in partnership with the Gov-

[1] Paragraph 24 (A) of defendant's answer.

ernment. This policy was first announced in the President's State of the Union Message of February 2, 1953.

23. In accordance with the Administration policy and in furtherance of its objective to reduce the budget, Joseph M. Dodge, Director of the Bureau of the Budget, eliminated from the TVA budget for the fiscal year 1955 a request for funds for the construction by TVA at Fulton, Tennessee, of a steam generating plant which was to serve the commercial, industrial, and domestic power needs of the city of Memphis and its environs. TVA's request for a similar appropriation in the budget for the fiscal year 1953 had been disallowed by the Truman Administration, but it had been included in the budget for the 1954 fiscal year, which President Truman left with Congress when the Eisenhower Administration took office. In March 1953 during his review of the then pending budget, Dodge disallowed the request for the fiscal year 1954. In the spring of 1953 and again in 1954, efforts to add an appropriation for the TVA Fulton plant were defeated in Congress.

B. Wenzell's Work in Budget Bureau in 1953

24. Through three telephone calls he made early in May 1953, George D. Woods, chairman of the board of directors of First Boston Corporation, obtained an appointment with [fol. 354] Dodge on May 11, 1953. First Boston is and was one of the leading investment banking concerns in the country. It underwrites security issues for both private and governmental entities. When the two men met in Washington, D.C., on the afternoon of May 11, Woods stated that he had read the published announcements of the Administration's policy of reducing the Government's participation in business activities, that he was wholeheartedly in accord with the policy, and that if there was anything which he or his firm could do to further the policy, they were ready and willing to be of service and assistance. Dodge, who had not been in office very long, was interested in having some power studies made, particularly for the purpose of ascertaining the subsidy the Government was providing to TVA. He had not been able to find the individual he thought appropriate to make the study and asked Woods for a suggestion, stating that the Bureau needed the services of a man who had worked on utility financing transactions

and was experienced in accounting and money costs. Woods replied that First Boston had such a man, Adolphe H. Wenzell, an engineer who had worked on many utility financing transactions and was qualified for the undertaking. Woods agreed to ascertain if Wenzell could be made available.

25. Upon his return to New York, Woods discussed the matter with Wenzell and found that he was willing to undertake the assignment. Woods also talked with his principal associates, James Coggeshall, Jr., president of First Boston, and Duncan Linsley, chairman of the corporation's executive committee, and learned that they had no objection to Wenzell's services being made available to the Bureau. Thereupon, Woods telephoned Dodge and made arrangements for Wenzell to meet Dodge on May 15, 1953.

At the time, Wenzell was one of 40 vice presidents of First Boston and one of its numerous directors. He had been employed by First Boston since its inception in 1934 and had been with its predecessors since 1923. Wenzell was an engineer, specializing in utility matters and serving in the buying department of the corporation. This department was concerned with investigations and negotiations [fol. 355] leading up to an undertaking by First Boston to underwrite securities. His entire business life and experience had been devoted to this type of work. At times, he supervised and personally conducted investigations of utility properties and the soundness of the management for the purpose of obtaining information that would enable First Boston to determine whether it should be identified with any financing for the company under investigation. He was regarded as an expert in this field.

26. Pursuant to the arrangements made, Wenzell met Dodge in the latter's office in Washington on May 15, 1953. Dodge talked with Wenzell about his experience, background, and the nature of the work to be done. From this and from a preliminary investigation he had made, Dodge was satisfied that Wenzell could perform the desired service. Accordingly, it was agreed that Wenzell would act as a consultant to the Bureau of the Budget on a part-time basis, spending one or two days a week in Washington at the Bureau, and then returning to First Boston's office in New York City to resume his work there. Wenzell was to serve

without compensation, but it was agreed that he would be paid $10 per day in lieu of subsistence and that his necessary transportation expenses would be paid by the Government through the use of transportation requests which were furnished to him for that purpose. It was understood that he would not sever his connection with First Boston and that he would continue to receive his regular salary from it.

Dodge instructed Wenzell to make a commercial, financial analysis of TVA, including a summary of its development and a comparison of its accounting and financial practices with those of privately owned utility companies—all with the ultimate objective of estimating the amount and showing the sources of the Government's subsidy to TVA. Dodge emphasized that he did not want an audit, an engineering examination, or a survey of TVA properties.

27. TVA is a very large supplier of electrical energy to the AEC. However, the AEC also purchases huge amounts of energy from private suppliers. One of these suppliers is the Ohio Valley Electric Corporation (hereinafter designated as OVEC), composed of a group of private utilities which, in 1952, contracted with AEC to supply it with [fol. 356] 1,800,000 kw. at Portsmouth, Ohio. This is one of the largest generating plants in the world, and a large amount of financing was required by the utilities that banded together to carry out this undertaking.

First Boston was employed by OVEC to arrange for this financing, consisting of directly placing the securities of OVEC with large institutional investors. It did so, and received a fee of $150,000 for its services, plus $20,000 for expenses.

The OVEC transaction was substantially completed in 1952, but in 1953, when Wenzell was first employed by the Budget Bureau, First Boston was performing some services in connection with the OVEC project.

28. Wenzell began work in the Bureau on May 20, 1953, and was introduced to the staff of the Resources and Civil Works Division, which handles the budget and legislative work relating to the Departments of Agriculture and Interior, the Federal Power Commission, TVA, and other agencies. Dodge had told Wenzell that he was to use TVA reports as the basic documents for the study, but the staff of the Resources and Civil Works Division was instructed to

provide him with any additional information he needed for that purpose.

29. Wenzell completed his assignment and submitted his report to Dodge about September 20, 1953. Between May 20, 1953, and the date the report was delivered, he made 11 trips to Washington and spent 29 days in the Bureau. On his first trip from New York on May 20, 1953, First Boston paid his transportation expenses, but the Government paid such expenses thereafter. During this period, he received $10 per diem from the Government for subsistence. He also submitted supplemental vouchers to First Boston for his subsistence expenses, and these were duly paid.

30. In the course of Wenzell's study, a considerable volume of written and printed data was made available to him by the Bureau staff. The material included TVA annual reports, General Accounting Office reports of TVA audits, TVA financial statements, material presented to the Bureau by TVA in justification of its budgets, a report on TVA's proposed electric generating plant at Fulton, a statement of tax-equivalents paid by TVA, and the like. He also had [fol. 357] discussions with one or more members of the staff on the financial status of TVA.

31. On August 31, 1953, Wenzell met with members of the Bureau staff and discussed generally his conclusions on his study of TVA operations. His comments regarding TVA operations were favorable but he stated that, in his opinion, not enough of TVA's hydroelectric power costs were charged to power. He also expressed concern about any further expansion of TVA's service area.

While he worked at the Bureau during this period, Wenzell was assigned an office next to that of Rowland R. Hughes, the Assistant Director of the Bureau of the Budget. Before Wenzell's report was completed, he showed it to Hughes, who made several suggestions regarding it.

32. Wenzell's report consisted of a concise summary of TVA operations, a comparison of its power system operations with those of private power companies, and a statement of the fiscal problems to be faced if future power requirements in the area were to be supplied by TVA. His report, in evidence as defendant's exhibit 10, was accompanied by his conclusions and recommendations, including the following:

(a) the electric generating capacity and annual power output of TVA is the largest in the country;

(b) the original purpose and program of the TVA, i.e., the hydro development of the Tennessee River Basin, was nearing its end;

(c) since 1951, TVA had been changing from a predominantly hydroelectric operation to a steam electric operation, because of the completion of the unified steam development program and a tremendous increase in the demands for power caused by TVA's efforts to supply a large portion of AEC's requirements;

(d) in addition to costs that properly belong to navigation and flood control, TVA had allocated an additional substantial portion of the cost of multiple-use facilities to navigation and flood control, whereas these costs should have been allocated to power operations;

(e) a comparison of the assets and revenues used by TVA for calculating payments made by it in lieu of general or local taxes with similar assets and revenues of 14 adjacent [fol. 358] private power companies showed that TVA paid only 50 percent as much general and local taxes as the private companies;

(f) on the basis of the true costs to the Government of long-term money, the deficiency in the earnings of the power division of TVA for the year ended April 30, 1953, was a substantial sum; this sum was a Government subsidy.

Among the alternative suggestions for future power supply to the TVA service areas were the following:

(a) the municipalities or cooperatives by themselves, or as a group, should have the right to construct steam plants to supply their expected load growth;

(b) the need for additional power in the area could be supplied by wholesale steam generating companies, which would sell the power to TVA under long-term contracts, and TVA would then distribute the power through its transmission network in the area;

(c) municipalities and cooperatives around the periphery of the service area could be served by adjacent power companies, but this idea was contrary to public utility practice and policy.

He also wrote that in order for TVA to escape the dilemma of being primarily interested in navigation and flood control on one hand and being forced into the steam power business on the other, TVA should retain ownership and control of all of the multiple-use dams and other navigation and flood-control facilities but the balance of its power system assets should be transferred to a fully taxpaying corporation, the entire capitalization of which, in the first instance, would be owned by the Government. The new corporation would purchase the entire output of power at the dams at a price which would include equivalent local taxes, interest at a rate equal to the cost of long-term Government money, and amortization of cost over a long period of time. All future capital requirements for expansion would be obtained through the sale to the public of regular corporate security issues without any kind of Government guarantee, and a definite program would be established to liquidate all of the Government-owned securities by sale to the public. In his report, Wenzell concluded that the adoption of this plan would accomplish the objective of getting [fol. 359] the Government out of the subsidized power business without surrendering any measure of control over navigation and flood control in the Tennessee River Basin.

33. When Wenzell's report was delivered to him, Dodge went over it briefly but did not read it carefully until later. Dodge never adopted or used any of the recommendations made in the report, nor did he consult Wenzell on any policy matters connected with the budget. Since he had not requested Wenzell to include recommendations in his report, Dodge was surprised to see them and they did not impress him. Wenzell's recomendations were not a factor in the policy decision, later communicated by Dodge to Strauss, that the AEC should enter into a contract with the utility companies.

On October 19, 1953, Dodge wrote Wenzell, expressing appreciation for the work Wenzell had done and stating that the report "was an extremely valuable contribution, not only for the material contained in it but its use as a foundation for further studies in consideration of the same subject." The letter also stated that the report "has been examined by two important individuals whose reaction to your work equal my own." The individuals referred to were

President Eisenhower and Ex-President Hoover, who were given copies of Wenzell's report.

34. Neither the Chairman of AEC, its General Manager, nor its Deputy General Manager, who was responsible in AEC for the discussion and development of data that led to the decision to negotiate the Power Contract and who headed the AEC group in negotiating the contract, had seen or were aware of Wenzell's report until four months or more after the date of the execution of the Power Contract.

35. When he handed his report to Dodge, Wenzell asked permission to retain a copy. Dodge agreed that since Wenzell was the author, he could have a copy on the condition that it would not be shown to anyone else since it was a confidential Bureau document. However, in the fall of 1953, after Wenzell had completed his assignment and had resumed his regular work in First Boston, Woods asked Wenzell for a copy of the report made to Dodge. Wenzell gave his copy to Woods, who read it over the weekend and returned it with the comment that Wenzell had done a good [fol. 360] job. Neither Wenzell nor Woods received permission from anyone in the Bureau for Woods to read the report.

C. Development of Plan to Secure Power From Private Sources in Lieu of TVA Fulton Plant

36. As previously stated, the Budget Bureau had decided in the fall of 1953 not to include any provisions in the budget for the fiscal year 1955 for the TVA projected steam plant at Fulton, Tennessee. The reasons for this decision, as subsequently stated by Hughes (defendant's exhibit 88), were:

(a) It was imprudent to embark upon a construction program requiring expenditures of one hundred million tax dollars in fiscal years 1955, 1956 and 1957 at a time when government borrowing was verging on the debt limit;

(b) both the Senate and House of Representatives, in considering TVA appropriation bills in the previous session of the Congress, had rejected amendments to provide funds for starting construction of the Fulton steam plant, and

(c) there was pressing need to explore the farreaching implications of a Federal policy of spending Federal tax

dollars for Federal steam plants to meet the power needs of this particular region and, if decided upon, to explore the impact of such a policy throughout other regions of America.

In a discussion with congressional leaders, Dodge had been told that if a request for funds for construction of the TVA plant in Fulton should be included in the budget, the request would not be approved by Congress.

When Gordon Clapp, the General Manager of TVA, learned of the decision during the fall of 1953, he informed representatives of the Bureau of the Budget that if provision for the Fulton plant was eliminated from TVA's budget, TVA would take the position that the power then being furnished by TVA to AEC should be reduced so that a like amount of power would be available to TVA to meet the growing needs of its other customers. TVA was then under a firm contract with AEC to supply its Paducah, Kentucky, installation substantially the entire output of TVA's generating plant at Shawnee, Kentucky, near Paducah. TVA was also supplying a large block of power [fol. 361] to the AEC installation at Oak Ridge, about 360 miles east of West Memphis, Arkansas. As a result, the Bureau of the Budget began drafting a statement for the President's budget message to the effect that an attempt would be made to relieve TVA of some of its power load to AEC and that if this did not prove to be practicable or successful, the matter of the construction by TVA of a plant at Fulton would be reconsidered.

37. On December 2, 1953, Dodge met in his office with Lewis L. Strauss, Chairman of the AEC, and Walter J. Williams, then AEC's General Manager. Dodge stated that it was desirable to avoid capital expenditures for new TVA steam generating capacity and that the Budget Bureau had considered that this objective could be accomplished by having AEC contract with private industry to construct a plant that would supply 450,000 kw. of additional power for AEC at its Paducah, Kentucky, installation by 1957, and by having AEC release a like amount of power which TVA was then supplying to it so that the released power would be available for TVA's other requirements. Dodge referred to Electric Energy, Inc. (hereinafter called EEI) and OVEC, two different groups of private utility companies which had previously entered into long-term power con-

tracts with AEC to build steam generating stations and to supply power to AEC at its installations in Paducah, Kentucky, and Portsmouth, Ohio. Dodge inquired whether the plan outlined by him would be feasible, whereupon Williams stated that the answer to the question would require discussions with J. W. McAfee, president of Union Electric Company and also president of EEI.

After the meeting, Williams arranged to meet McAfee, who had been helpful in arranging for the construction by EEI of a plant at Joppa, which was then being completed to furnish AEC power at its Paducah installation. When McAfee met with Williams on December 8, 1953, Williams asked whether EEI or some similar corporation would be interested in building a plant to supply AEC with as much as 450,000 kw. of generating capacity by the middle of 1957. McAfee stated that it would be difficult for EEI to add generating capacity at Joppa and suggested either a plant upstream from Cairo but downstream from the Joppa plant, [fol. 362] or a plant near the town of Shawnee. He agreed to make some inquiries about the matter. Later, on December 14, 1953, Williams telephoned McAfee, requesting that the latter write the AEC and indicate his interest in furnishing the generating capacity mentioned on December 8. On December 14, 1953, McAfee wrote the requested letter, stating that he thought a group of private investors could be formed to supply AEC the amount of power requested at its Paducah project upon substantially the same rates and terms as provided for in the contract between AEC and EEI. Williams had earlier cautioned McAfee to make only general inquiries and not to disclose the particular project under discussion. Accordingly, in his letter, McAfee stated that when he received more specific information he would be in a position to discuss the project with financial institutions and prospective members of a managing group so that more definite information could be supplied.

A copy of McAfee's letter was sent to William F. McCandless, Assistant Director for Budget Review in the Budget Bureau, who had been told of the meeting with McAfee and had requested a copy of the letter in order that he might show it to Dodge. The Budget Bureau's interest in any proposal which might be submitted by McAfee's group was twofold: first, the Bureau was concerned with relieving the

burden on the budget of the large capital outlay required for building additional facilities for TVA; second, in such a transaction, the Budget Bureau acts as the Administration's mechanism to make certain that the project is defensible. Dodge realized that the Budget Bureau would later be called upon by both the White House and a congressional committee to give an opinion about the project.

38. On December 17, 1953, Hughes met with Gordon R. Clapp, Chairman of the Board of TVA, and with members of the staffs of the Budget Bureau and TVA. At this meeting, Clapp was informed that no money would be included in the 1955 budget to provide new steam plants for TVA but that arrangements were being made to reduce by the fall of 1957 existing TVA commitments to AEC by some 450,000 kw., thus providing TVA with power for reasonable growth in industrial, municipal, and cooperative loads through 1957. At Clapp's request, it was agreed that an [fol. 363] attempt would be made to relieve TVA of a minimum of 500,000 kw. and that this amount would be increased to 600,000 kw. if possible. Clapp was told that if negotiations for furnishing the AEC load requirements from other sources were not consummated, the question of starting additional generating units in the TVA area would be reconsidered. On the following day, December 18, 1953, the statements made to Clapp were confirmed in a letter sent to him by Dodge.

After December 17, 1953, Dodge delegated responsibility for carrying on the project to Hughes, and thereafter Dodge's connection with the matter became less and less frequent. He resigned on April 15, 1954, and was succeeded by Hughes.

39. Sometime prior to December 14, 1953, Dixon learned from McAfee that AEC might be seeking an additional source of power in the Paducah area. Dixon was interested in the information for two reasons: (1) the potential sale of electric power, and (2) his feeling that his company should make a contribution to the effort of supplying the electric power needs of the Government through investor-owned power companies rather than through publicly-owned power companies.

On December 23, 1953, Dixon met in Strauss' office with Williams, Strauss, and Kenneth D. Nichols, who had been

selected to succeed Williams as General Manager of AEC when the latter resigned on January 31, 1954. The purpose of the meeting was a discussion about having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to AEC there. There was also a discussion about the power situation in the Tennessee area, and there were maps indicating the power loads and utility plants in that area. Dixon referred to and produced a copy of a letter which Mississippi Power & Light Company, one of the subsidiaries of Middle South, had written to TVA under date of October 15, 1953, proposing to supply to TVA for a term of 20 years a block of 450,000 kw. of power in lieu of the construction by TVA of its proposed Fulton plant, and for that purpose to construct near Memphis a plant which would deliver the power to TVA at the Tennessee State line.

[fol. 364] On the same day, Williams telephoned McCandless at the Budget Bureau to inform the latter about the meeting. On the next day, Williams sent McCandless a copy of the letter which had been left by Dixon.

40. On December 24, 1953, Hughes, as Acting Director of the Budget Bureau, wrote to Strauss, stating that the Bureau understood that as a result of preliminary conversations between AEC and private interests, arrangements could probably be worked out to supply AEC at Paducah with 500,000 (and possibly up to 600,000) kw. more of electric power from non-Federal sources than AEC was then scheduled to receive by 1957 and that these arrangements would relieve TVA of its previous commitments to AEC in like amounts, freeing such power for normal load growths in the TVA area. He also stated that the TVA budget would be based on that expectation, but that if satisfactory arrangements could not be developed to provide such power for AEC installations from private sources, reconsideration would be given to TVA's request for appropriations to build additional power facilities. Hughes' letter expressed the understanding that the arrangements he referred to related solely to existing firm commitments for permanent power between TVA and AEC. The letter stated that it would be helpful if AEC would proceed with the negotiations with a view to reaching a firm agreement with private interests to supply the amount of power stated above by not later

than the fall of 1957. Hughes requested that the Bureau be kept currently informed regarding the negotiations, because of the necessity of submitting supplemental appropriations to Congress during the following spring in the event the arrangements mentioned were not consummated.

41. On the basis of the opinion expressed in McAfee's letter of December 14, 1953, the section of the President's budget message relating to TVA was formulated and later released. In the message, which was delivered to Congress on January 21, 1954, the President stated as follows with respect to additional power plants for TVA:

> Although no appropriations are included in the 1955 budget for new power generation units by the Tennessee Valley Authority, expenditures will increase for continuation of construction of power plants presently un- [fol. 365] derway, and for operation of power plants after they are completed. Expenses for operation of flood control, navigation, and fertilizer facilities will continue at about the 1954 level. Expenditures for power and fertilizer operations are more than offset by the income from sales. In order to provide, with appropriate operating reserves, for reasonable growth in industrial, municipal, and cooperative power loads in the area through the calendar year 1957, arrangements are being made to reduce, by the fall of 1957, existing commitments of the Tennessee Valley Authority to the Atomic Energy Commission by 500,000 to 600,000 kilowatts. This would release the equivalent amount of Tennessee Valley Authority generating capacity to meet increased load requirements of other consumers in the power system and at the same time eliminate the need for appropriating funds from the Treasury to finance additional generating units. In the event, however, that negotiations for furnishing these load requirements for the Atomic Energy Commission from other sources are not consummated as contemplated or new defense loads develop, the question of starting additional generating units by the Tennessee Valley Authority will be reconsidered.

42. On January 4, 1954, McAfee wrote Williams, stating that since their discussion in Washington, McAfee was im-

pressed with the necessity of considering other alternatives. He suggested the following, in order of priority, as a means of relieving the Federal budget of avoidable capital expenditures in the TVA area: (1) that TVA no longer assume full responsibility for supplying the needs of municipalities, and as existing contracts expired, that the municipalities which needed a greater supply of power than was available from TVA, be obliged to purchase power from others or construct municipal power plants; (2) that TVA arrange with neighboring power companies to buy power from them, and (3) the plan under discussion, i. e., a contract between AEC and private industry to supply power to AEC at Paducah.

Strauss was notified of the receipt of the letter, copies of it were distributed in AEC, and it was discussed in that agency.

43. On January 14, 1954, Hughes and McCandless attended a meeting in Strauss' office with Strauss, Williams, and Nichols. Reference was made to the two letters from Mc-[fol. 366] Afee and to the proposal which Mississippi Power & Light Company had submitted to TVA on October 15, 1953. Nichols pointed out to Hughes and McCandless that if AEC purchased more power from private utilities in lieu of the power being furnished by TVA under firm contracts with AEC, the cost to AEC would be greater and the supply less certain because of possible delays in the construction of the plant and the location of reserve power. He stated that McAfee was not eager to enter into such contract and that from an engineering point of view, Paducah was not the proper location for the new power plant, because if the AEC's needs there were reduced, it would be difficult and expensive to use the surplus power elsewhere. Finally, he suggested that if the power was needed in the Memphis area, it would be better for the city of Memphis or for TVA to enter into a power contract with private utilities to construct a plant in that area along the lines that had been suggested by Dixon and McAfee.

McCandless requested that the AEC pursue the matter further with McAfee.

After the meeting in Strauss' office, Williams arranged for McAfee and Dixon to attend a meeting in Strauss' office on Wednesday, January 20, 1954.

44. There is no evidence that Dixon, McAfee, or any representative of defendant had any contact with Wenzell during the period from November 1, 1953 to January 14, 1954. Neither McAfee nor Dixon knew of the report Wenzell made in September 1953.

D. Preparation, Submission, and Review of Sponsors' Proposals, and Wenzell's Activities in Connection Therewith

45. About the middle of January 1954, Hughes suggested to Dodge the advisability of requesting Wenzell to again assist the Bureau, because of Wenzell's study of TVA and his knowledge of commercial transactions. By that time, the Administration had decided that AEC should proceed to make a contract with private utility companies and that the TVA plant at Fulton would not be built. Dodge authorized Wenzell's return and thereafter, when Wenzell was working at the Bureau, Dodge saw little of him until March 1954. [fol. 367] The Bureau was concerned that any proposal which it considered met its fiscal standards, namely (1) that the cost of the power to be contracted for by AEC would be reasonable in relation to the cost of other power used by AEC, and (2) that the cost of power under any proposal could be reconciled with the estimated cost of power from the proposed TVA Fulton plant, taking into account the cost of interest and taxes paid by the private companies. Wenzell was to assist the Bureau again as a part-time consultant during the exploratory discussions on the project, particularly with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs.

46. In response to a telephone call made by Hughes on January 14, Wenzell met Hughes in Washington on January 18, 1954. Hughes told Wenzell that the Government had decided to have a private power company construct a large steam generating plant near Paducah, Kentucky, to supply approximately 600,000 kw. of power to the AEC in substitution for a like amount of power then being supplied to AEC by TVA in the same location. Hughes showed him a paragraph in the President's budget message reflecting the decision that had been made (finding 41); stated that meetings had already been held with the utility executives dur-

ing the month of December, and said that another meeting at the AEC had been arranged for January 20 with Dixon and McAfee. Hughes emphasized the need for great speed on the project, and after learning that Wenzel knew both Dixon and McAfee, Hughes asked Wenzell to attend the meeting and to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter.

Wenzell had met Dixon about 1943. In 1948 or 1949, he had talked to Dixon in connection with services that First Boston proposed to render to Arkansas-Missouri Utilities Company, a customer of Arkansas Power & Light Company, one of Middle South's subsidiaries.

On the same day (January 18, 1954), Hughes made an appointment by telephone for Wenzell to see Strauss in order that Wenzell could learn further particulars about the meeting to be held on January 20. No mention was made at [fol. 368] the time about the cost of interest rates involved in financing the project.

47. During the afternoon of January 18, 1954, Wenzell went to the AEC building and had a very brief meeting with Strauss. All visitors at AEC were required to sign a "Visitor's Registration" card which contained a space for the name and address of the visitor and his "Organization". On that occasion and on each occasion thereafter when Wenzell visited the AEC, he specified his address as "100 Broadway, N. Y. City", which was the address of the offices of First Boston, and inserted "First Boston Corp." in the space specified for the organization. Wenzell did this to provide information as to where he could usually be found by anyone looking for him.

Wenzell told Strauss that he was there at the request of Hughes and was trying to get some background of the program and plan. Strauss had never met Wenzell before, and there is a conflict in the testimony of Wenzell and Strauss as to whether Wenzell stated he was connected with the Bureau of the Budget. The greater weight of the evidence shows that Hughes told Strauss that Wenzell was a banker connected with the First Boston Corporation as an officer or a partner, and that Strauss was to acquaint Wenzell with the background and purpose of the meeting to be held on January 20, 1954. Strauss assumed that Wenzell was to

attend the meeting to advise all concerned on matters within his competence. Strauss was aware that the cost of money, i. e., the interest rate on the securities which might be issued by the private utility companies, was an important element in the total cost to the Government of any facilities that might be constructed. Strauss stated that the AEC was trying to move forward rapidly with the program that Hughes had outlined to Wenzell. Strauss also emphasized that it was important that the private utility companies give serious consideration to the matter to be discussed and that it be handled without delay. Wenzell told Strauss that he was a vice president of First Boston, and Strauss stated that he was familiar with that firm. It was then arranged that Wenzell would discuss the matter the following day with Williams. Wenzell returned to New York City that evening. [fol. 369] 48. On January 19, 1954, Dixon received a telephone call at his New York office from Wenzell who stated that he would be present at the meeting on January 20 as a representative of the Bureau of the Budget and that Dixon should not be surprised to see him there.

49. Pursuant to the arrangements previously made, Wenzell returned to Washington from New York on January 19 to see Williams at AEC. On his own volition and without consulting any representative of the defendant or of First Boston, Wenzell took with him Paul Miller, an assistant in First Boston's buying department. Miller had participated actively in the financing of the OVEC project in which First Boston had acted as financial agent for OVEC. Wenzell thought that it was inevitable that various questions relating to financing an enterprise such as the OVEC project would arise at the January 20 meeting and that it would be desirable to have an expert available to answer such questions.

At the AEC building, Miller registered as representing First Boston, as did Wenzell. Wenzell and Miller met with Williams and Cook of the AEC, and were advised by Williams of the discusions that had previously been held with Dixon and McAfee. Cook was present, because he had been designated as the official who was to be responsible for looking after the project for AEC after Williams' resignation, which occurred on Jaunary 31, 1954. There was no discussion about financing, and there is no evidence of any state-

ments made by either Wenzell or Miller. Cook and Williams were told that Wenzell was a consultant to the Bureau of the Budget, but Cook did not know until later that Wenzell was also an officer of First Boston. Wenzell and Miller remained overnight in Washington.

50. On the morning of January 20, Wenzell and Miller first met with Hughes and then went to the AEC to attend the scheduled meeting, which was delayed until afternoon because of McAfee's late arrival. At AEC Wenzell and Miller had a general discussion about the proposed project with Williams. At 3 p.m. the meeting convened. In addition to Wenzell and Miller, it was attended by McAfee and Dixon, and by Williams, Cook, MacKenzie, and Sapirie of AEC. Strauss was present for a few minutes. Wenzell was the [fol. 370] only representative of the Budget Bureau at the meeting. Miller was not a representative of any Government agency but, as earlier stated, had come to Washington at Wenzell's request.

51. The proposal that had been discussed before the meeting was the construction of additional facilities in the Paducah area to supply power to AEC as a substitute for power then being furnished by TVA to AEC at Paducah, so that AEC could release a like amount of power to TVA for use by its other consumers. McAfee and Dixon stated that they were ready and willing to do anything possible, without regard to profit, to help with the problem of furnishing power. Thereupon, there was much discussion about the wisdom of constructing a new plant near Paducah where so much power generation was already concentrated. It was pointed out that if the AEC cancelled its existing contracts at Paducah or reduced its power consumption there, there would be great difficulty in marketing the tremendous oversupply of power in that area.

It was made plain that the purpose of the power plant to be constructed was not to satisfy any increased need of the AEC but to relieve TVA's need in the Memphis area, and this led to a discussion of the possibility of building the plant near Memphis to produce power for delivery to TVA. Since the AEC had no projects in the Memphis area and required no power there, a question arose as to whether AEC should act as the contracting agency with the private utility companies, as had originally been proposed by the Govern-

ment. It was stated that AEC would contract and pay for the power but that it would be physically delivered to TVA, and that the effect of this would be to release an equivalent amount of power which TVA was supplying to AEC at Paducah. Dixon stated that he thought it would be a much better plan to have TVA contract directly for the proposed new plant instead of having AEC act as contracting party. No questions were raised regarding the details of financing the proposed plant, and there is no evidence that Miller made any statements or suggestions at the meeting.

After the meeting at the AEC had adjourned, there was a conference shortly thereafter in Hughes' office in the Budget Bureau in accordance with arrangements that Williams had [fol. 371] made. The conference was essentially a continuation of the meeting at the AEC. In attendance were MacKenzie, Cook, Williams, McAfee, Dixon, Wenzell, Miller, McCandless, and Hughes. McAfee and Dixon reiterated their desire to be of assistance but again expressed their concern about the location of another plant at the Paducah area, pointing out that such a plant would require additional transmission lines for both TVA and the private utilities at considerable additional costs and that the area was geographically unsuitable for future distribution and use of the power in the event AEC's needs were reduced.

Dixon stated that Middle South's utility system had previously made proposals to furnish TVA 450,000 kw. in the Memphis area and was ready to do so at any time at whatever cost the Federal Power Commission deemed fair. It was finally decided that Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could generate 450,000 to 600,000 kw. of power across the river from Memphis in the territory of Middle South.

Hughes indicated that probably the AEC could contract for the construction of a plant in the Memphis area, but both Dixon and McAfee thought this was an awkward way of handling the matter. After the utility company executives had argued this point somewhat, Hughes informed them that the decision as to which agency would be the contracting party would be made by the Government.

The evidence shows that from December 2, 1953 (the date on which Dodge first discussed the proposed project with

Strauss), until the Power Contract was signed, the defendant never changed its decision that the AEC was to be the contracting agency for the generating plant. However, the meeting in Hughes' office on January 20, 1954, was the first occasion when the Government requested the utility company executives to consider the construction of the proposed power plant in the Memphis area rather than at Paducah.

52. There is no evidence of any statements by Wenzell at either of the January 20 meetings. Miller said nothing at the first meeting, but at the meeting in Hughes' office, he pointed out that a heavy concentration of power in the Paducah area and the possibility of a decrease in AEC's [fol. 372] need there might affect the prospects of obtaining money for the construction of the proposed plant.

53. On the morning of January 20, 1954, Wenzell told Dixon that during the previous summer he had made a confidential study for the Budget Bureau in Washington and had been recalled by the Bureau. He also told Dixon that he was attending the January 20 meeting as a representative of the Budget Bureau rather than as a First Boston man. At that time, Dixon did not understand what Wenzell's assignment in the Bureau of the Budget was nor was he told the precise nature of Wenzell's work.

At the close of the meeting in Hughes' office, Dixon stated that he would begin some investigations of the kind mentioned at the meeting. Since Dixon expected to be absent from New York for a few days, it was agreed that Wenzell would meet with Tony Seal of Ebasco, which performed engineering services for Dixon's companies. Wenzell was to inform Seal about what was contemplated in order to expedite the matter.

On the evening of January 20, 1954, Wenzell and Miller returned to New York. Their transportation and other expenses of the trip from New York to Washington and return were defrayed by First Boston.

54. Wenzell did not return to Washington until February 4, 1954, but on January 21, 1954, he met with Seal pursuant to the arrangements made on January 20. Wenzell related to Seal the substance of the discussions that had been held in Washington and advised him to get busy on an exhaustive study of the proposed project. There was no discussion of finances at the time.

The meeting with Seal and subsequent meetings which Wenzell had in New York until about March 15, 1954, with representatives of the utility companies were held either at the request or with the knowledge of Hughes, to whom Wenzell frequently telephoned from New York.

55. On January 27, 1954, Seal and Paul Canaday, who was a vice president and director of Middle South, came to Wenzell's office at First Boston. Canaday and Seal were attempting to formulate a plan for the project. Wenzell stated that he was at their service as a representative of the Bureau of the Budget on the all-important matter of the [fol. 373] cost of interest on money that would be borrowed to finance the construction of the plant. It was well known that the cost of money played an important part in the cost of the entire project and in the price at which the energy could be produced and sold.

During the period of Wenzell's services with the Budget Bureau, which began in January 1954 and ended April 3, 1954, Wenzell was advising Hughes as well as Dixon and his associates on the cost of money. Hughes had requested Wenzell to stay in touch with Dixon and his associates on the development of a proposal and particularly to help point up the real cost of money to be used in financing the project. The object was to obtain the best rate possible and to get a figure which would not only be used by Dixon but would be known to the Bureau so that both would be talking about one and the same factor.

On January 29, 1954, Hughes telephoned to Wenzell in New York City to find out what had occurred in the meetings that Wenzell had had with Canaday and Seal.

56. On February 3, 1954, Wenzell met again with Canaday and Seal who were working on a proposal. The evidence does not show what the parties said or did. At that time, it was too early to discuss the details involved in financing the project.

57. On February 4, 1954, Wenzell returned to Washington to see Hughes in order to bring Hughes up to date on what had occurred during Wenzell's New York meetings with Dixon's associates. Although the evidence on the matter is not clear, it appears that Dixon was in Hughes' office on the same day and engaged Hughes and Wenzell in a conversation about the cost of money for the project. Dixon and

Wenzell returned to New York on the same day by plane. Wenzell inquired about the status of the work of Dixon's organization in the preparation of a proposal, and there was some discussion about the cost of money and about Wenzell's responsibility in furnishing information about this phase of the matter. Dixon then asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest-rates in the then current money market would be for financing a project similar to the OVEC project.

[fol. 374] 58. On February 5, 1954, a meeting arranged by Wenzell was held in his office. Besides Wenzell, Harter and Cannon, vice presidents of First Boston's sales department, and Miller were present. Since Harter and Cannon were in touch with the securities markets, Wenzell asked for their best judgment on the interest rates that would have to be paid for funds borrowed to finance the construction of a plant ~~similar to~~ OVEC, taking into account three hypothetical bases of corporate capitalization, i.e. (1) a high debt ratio of from 90 to 95 percent of debt to total capital, (2) an intermediate ratio of from 75 percent debt to total capital, and (3) a ratio of 50 percent debt and 50 percent equity. It was assumed that the total cost of the plant would be about 90 million dollars. After careful consideration of the problem, Wenzell was told that money could be obtained on the three hypothetical bases at the following respective interest rates: (1) 3½ percent, (2) 3½ percent, and (3) 3¼ percent. Wenzell could have obtained this information from other sources, but he was acquainted with the First Boston executives and considered that First Boston was one of the best and most reliable sources, if not the best source, of such information.

Wenzell did not indicate why he wanted the information from Harter or Cannon, nor what was to be done with the figures supplied by them.

Later, during the same day, Wenzell had a telephone conversation with Dixon and advised him about the results of the meeting.

59. On February 8, 1954, Wenzell went to Washington to report to Hughes the results of the meeting held on February 5 at First Boston on the cost of money. Hughes requested that further studies be made on other forms of

capitalization and on different periods for repayment of the debt. Hughes stated that the Government could not contract for power for a longer period than 25 years, but he wanted information on amortization of the debt for a longer period of time so that a portion of the debt would be outstanding after the expiration of the contract with the Government.

During the day, Dixon and Canaday met with Wenzell and also with E. J. Donnelly of the Bureau of the Budget in Wenzell's office in the Bureau. Donnelly was the prin- [fol. 375] cipal budget examiner for the TVA, the Canal Zone, and other agencies. In 1953, when Wenzell was engaged in his study of the TVA, he had obtained most of the data used in preparing his report from Donnelly. Also, Donnelly mailed Wenzell additional information regarding TVA on January 22, 1954. In the room at the time, there were a number of documents relating to TVA, of which some were published and some were not available to the public. At the meeting, those present particularly looked at and used the monthly financial statements which were prepared by TVA for its own purposes. The Budget Bureau was furnished a copy each month, but the documents were not available to the public. There was a general discussion on the various costs incurred by TVA, such as generation, transmission, and other costs set forth in the financial statements. Wenzell asked Donnelly to supply certain additional information relating to the cost of power to TVA, the quantity and cost of power TVA purchased from private industry, and TVA's cost of distribution.

At Hughes' suggestion, Wenzell went to a meeting on the same day in Nichols' office at the AEC, where Dixon, Canaday, and Seal were also present. Dixon reiterated his previous statement that the project was being approached in an awkward manner, but that he would do his best to prepare a proposal in accordance with instructions given by the Bureau of the Budget.

60. On Wednesday, February 10, 1954, Wenzell had another meeting at First Boston with Cannon, Harter, and Miller to obtain some further information on interest costs in relation to the longer period of amortization which Hughes had mentioned to Wenzell on February 8. The discussion was concerned with a capitalization based upon a ratio of 80 percent debt and 20 percent equity. On the

assumption that the total amount borrowed would be 120 million dollars, that it would be amortized over a 40-year period, that the AEC contract would run for 25 years, and that 75 percent of the debt would be paid off at the expiration of the contract, the conclusion was reached that the loan could be made on the basis of an interest rate of 3½ percent.

[fol. 376] During the same afternoon, Hughes phoned Wenzell, and later Wenzell and Seal had a telephone conversation. It was Wenzell's recollection that he probably gave both Hughes and Seal a report of the results of the meeting at First Boston.

61. On or about February 14, 1954, Wenzell attended a meeting in Dixon's office where Dixon, Canaday, and Seal were present. Canaday and Dixon had been working on figures and had reached the point where they tried out the application of interest rates. Wenzell gave them the information on interest rates that he had previously obtained from First Boston, and they made some tentative calculations on the basis of those rates. Hughes had impressed upon Wenzell the necessity for speed on the project, and Wenzell was interested in seeing that work on the proposal was proceeding.

On February 15, Hughes again telephoned to Wenzell in New York to discuss the project. Hughes was aware that Wenzell had attended the meeting in Dixon's office as a consultant of the Budget Bureau. On the same day, there was a telephone conversation between Wenzell in New York and Dixon in Pittsburgh, but there is no evidence as to what was discussed.

62. About the middle of February 1954, Dixon asked Paul Hallingby, then assistant to Dixon as president of Middle South, to give his opinion as to whether a proposed power plant could be financed through the issuance of securities based upon a debt ratio of 95 percent debt to 5 percent equity as in the OVEC project and, if so, what the cost of the debt money would be. Hallingby made inquiries of several investment bankers and officers of institutional investors (other than First Boston), who were well apprised of the state of the bond market, and then informed Dixon that debt financing could be obtained at an interest rate of about 3½ percent on an assumed debt structure like that of OVEC.

63. When McAfee learned at the meeting of January 20, 1954, that the defendant was considering the erection of the proposed power plant in the Memphis area, he lost interest in the matter because the location was far removed from the pool area of the companies in which he was interested. [fol. 377] On January 22, 1954, he left for the Orient and was out of the country for nearly two months.

About February 16, 1954, Dixon met Ralph Moody, an officer of Union Electric Company, in Pittsburgh to discuss the question of whether Union Electric would join with Middle South in making a proposal to the AEC for the proposed plant in the Memphis area. Dixon then learned that Union Electric had no interest in the matter because the location was outside its pool area. However, Moody wrote McAfee, who replied that he had not changed his mind and that his company would not participate in the construction of a plant in the Memphis area. Moody advised Nichols of McAfee's decision on February 19, 1954.

Sometime prior to February 18, Dixon informed Wenzell that Union Electric was no longer interested in the project, and Wenzell promptly relayed this information to Hughes.

64. About February 18, 1954, Wenzell learned from Dixon that he was to attend a meeting the following day in the offices of Southern in New York City in an effort to persuade that company to join in the venture.

In a telephone conversation prior to the meeting, Hughes requested Wenzell to attend as representative of the Budget Bureau. When Hughes learned that McAfee's company had decided not to participate in the venture, Hughes was disturbed because he felt that if only one company had to carry the entire responsibility, there was a chance that no proposal would be made to AEC.

65. At the meeting held on February 19, 1954, in the offices of Southern, Dixon, Canaday, and Seal were present as representatives of Middle South. Southern officers who attended included Yates, James M. Barry, chairman of the executive committee, the company's senior engineer, its senior accountant and its senior counsel.

First Boston had done a considerable amount of financing for the subsidiaries of Southern, and Wenzell had known Yates for many years. However, the meeting of February 19 was the first occasion at which Wenzell had ever met

with or talked to Yates concerning the project. Wenzell was told by Yates that he had been to see Hughes a few days prior to the meeting and that the Georgia Power Company, [fol. 378] one of southern's operating subsidiaries, had previously written TVA offering to sell a substantial block of power. At the close of the meeting, Yates gave Wenzell copies of the correspondnce relating to the offer made to TVA.

During the meeting, Dixon made an earnest plea for Southern to join Middle South in the proposed venture and stated that Middle South had done sufficient preparatory work to determine that a proposal could be submitted to the Government. There was little or no discussion about financing the project. Except for Wenzell's conversation with Yates regarding the latter's earlier meeting with Hughes, there is no evidence of what Wenzell said or did at the meeting. On the same day, Wenzell advised Hughes by telephone of what had occurred at the meeting. Hughes stated that he was pleased to hear that Dixon was trying to get another partner. About February 20, 1954, Southern decided to join in the venture, and Yates notified Hughes and Nichols of this decision the same day.

66. On February 19, 1954, Wenzell left on a trip for Denver and did not again engage in any activities relating to the project until February 23, 1954, when he met Hughes and Dixon at the Budget Bureau.

Beginning on February 1, 1954, Canaday and Seal had been making a number of calculations which were used in the preparation of the proposal submitted by Middle South and Southern to AEC on February 25, 1954. The actual drafting of the proposal did not begin until February 20 after Southern had agreed to joint the venture. Wenzell did not participate in the drafting of the proposal.

At the February 23 meeting Dixon showed Hughes a copy of an early draft of the proposal. About noon on the same day, Dixon and Yates met in the AEC with Nichols. McCandless and Wenzell were also present as representatives of the Bureau of the Budget. The purpose of the meeting was to review the tentative draft of the proposal with Nichols to ascertain whether it contained sufficient information for AEC's consideration.

67. While he was in Washington on February 23, 1954, Wenzell drafted an opinion letter which he showed to both Dixon and Hughes. The letter read as follows:

[fol. 379] DRAFT—2/24/54

LETTERHEAD OF THE FIRST BOSTON CORPORATION

Mr. E. H. DIXON,
President, Middle South Utilities, Inc.
2 Rector Street, New York 6, N.Y.

DEAR MR. DIXON:

You have furnished us with a copy of the proposal of Middle South Utilities, Inc. and The Southern Company addressed to the Atomic Energy Commission dated —— for the sale to the AEC of 600,000 kw of electric power through the creation of a new generating company which would undertake the construction of the necessary facilities. You have advised us that you estimate the capital requirements of the new company for facilities and working capital at around $120,000,000, which you propose to finance on the basis of approximately 95% debt and 5% common stock equity. The equity, to be paid in, is to be $6,000,000 and is to be owned by Middle South Utilities, Inc. and The Southern Company, either directly or by their operating subsidiaries and, possibly, by other utility companies. You have also advised that you want to arrange for up to $130,000,000 of debt capital in order that you may have some cushion for contingencies.

You have asked us to advise you as to the cost of such debt securities on the basis of the 25 year power contract with the AEC outlined in said proposal supplemented by a (30 year) power contract between the proposed generating company and the utility companies owning the common stock equity under which these companies will agree to take or pay for sufficient power to service the debt securities to the extent that sales to the AEC r to others may not be sufficient to do so, first mortgage bonds not exceeding $130,000,000, having a maturity of 30 years (beyond the completion date of the new plant, estimated to be approximately 36 months)

and amortized through a level debt service type of sinking fund (which will retire 75% of the bonds by the end of 25 years after the facilities are completed and 100% by maturity).

It is our opinion that under the foregoing circumstances, and under existing market conditions, such debt securities can be sold by the corporation to institutions at an interest cost not to exceed 3½% per annum.

It is understood that bond proceeds will be taken down over the period of construction of the facilities estimated to be approximately three years and that a [fol. 380] standby charge of ——% per annum for the unused portion of the $130,000,000 total will accrue starting ————.

Very truly yours, The First Boston Corporation,
By ——, ——.

Although Wenzell prepared the draft in Washington on the 23rd, his recollection was that it was typed and dated when he returned to his New York office on the following day.

The draft of the proposal which Dixon and Yates had available for the meetings of February 23 contained, in the following paragraph, the only reference to the cost of money:

> We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation.

The above-quoted statement was inserted in the proposal in reliance on the oral information previously given by Wenzell to Dixon as the opinion of First Boston that the project could be financed on the basis described in finding 60. Dixon had suggested to Wenzell that it would be desirable to have First Boston's oral opinion set forth in a letter, and this suggestion led Wenzell to prepare the draft. On February 23, when the sponsors' tentative proposal was shown to Hughes, he was told that the above-quoted statement was based on First Boston's oral opinion on interest costs, and

that a draft of a letter from First Boston, confirming the oral opinion, was being prepared.

As previously stated, the cost of money was an important factor in the total cost of the project, and Hughes had requested Wenzell to make sure that the interest rate to be used by the sponsors in their proposal would be the best figure obtainable, under a capitalization based on a high ratio of debt to equity and with the debt payable over a long period of time. The draft prepared by Wenzell on February 23 was not formally executed by First Boston, but if it had been signed and sent by First Boston, it would have [fol. 381] substantiated the oral opinion previously obtained by Wenzell from First Boston and conveyed to Hughes and Dixon.

68. Sometime in the week prior to February 27, 1954, Dixon and his counsel, Daniel James, had a discussion about Wenzell's activities. James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project. Therefore, James told Dixon that since Wenzell was an officer of First Boston and was also employed by the Budget Bureau, a difficult situation might be created if Dixon should subsequently ask First Boston to handle the financing of the project. James said it was apparent that the project was developing into a public versus private power fight and that it would be unwise to give the opposition anything which could be used as the basis for an attack. James did not consider that a conflict of interest was involved but thought the sponsors could not afford a situation where the opposition might make it appear that there was a taint of illegality. James advised that Dixon mention the matter to Wenzell with the suggestion that Wenzell might want to speak to his own counsel and to the Budget Bureau about it.

In accordance with the advice received from his attorney, Dixon spoke to Wenzell about the matter in Washington on February 23, 1954. The record does not clearly show what he said to Wenzell, but in substance he asked whether Wenzell had considered the possibility that criticism and embarrassment might result from the fact that Wenzell, as an officer of First Boston, had been doing special work on a project for the Bureau of the Budget, if it later developed

that First Boston should be employed to handle the financing of the same project. He suggested that Wenzell discuss the situation with the Bureau of the Budget and with his counsel.

69. On the same day (February 23), Wenzell told Hughes that there were certain implications that might flow from Wenzell's interest opinion draft; that the sponsors were submitting to the Government a proposal which was based upon an interest rate that was accurately described in Wenzell's draft; that the interest rate mentioned in Wenzell's draft was "a very tight figure", which Wenzell had given to [fol. 382] the sponsors because it was desirable to get an accurate figure with the expectation that the financing could be obtained at the rate mentioned. He further stated that First Boston was the source of the information in this draft and that if market conditions changed for the worse, the sponsors could use the draft as a moral commitment by First Boston, obligating it to arrange for the financing at the interest rates stated. He then pointed out to Hughes that if it later developed that First Boston should be asked to handle the financing for the sponsors and should give them a letter similar to Wenzell's draft, the facts that he had been the instrumentality for obtaining the interest figure from First Boston, had given the figure to the sponsors, and had used the same figure in his draft could cause criticism against and embarrassment to the Administration, in that it could be charged that he, as a First Boston officer and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston. Although Wenzell spoke to Hughes about embarrassment to the Administration, the record as a whole shows that he was concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well. In the conversation, Wenzell suggested that Hughes discuss the subject with his political advisers. Hughes replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore the question with counsel, and then to talk with Dodge about the matter.

70. Wenzell returned to New York on February 23 and, after he arrived at his office in the evening, he discussed the

problem referred to in the preceding finding with Coggeshall, president of First Boston. In a general way, Coggeshall knew that Wenzell had been doing some work with the Budget Bureau, but he had no direct responsibility for Wenzell's activities. However, since Woods was abroad, Wenzell briefly related his conversation with Hughes to Coggeshall, who felt that the situation was of such importance that Wenzell should obtain advice from First Boston's counsel, Sullivan & Cromwell. Coggeshall thereupon called Arthur Dean, the partner in the firm who generally handled First Boston's [fol. 383] business, stating that Wenzell had been working as a consultant to the Bureau of the Budget, that certain problems had arisen, and that Wenzell wanted to talk with Dean or one of the partners in the firm. Since Dean was leaving the city, it was arranged that Wenzell would see Raben, another partner in the firm, on February 26, 1954.

71. On February 25, 1954, Middle South and Southern submitted to the AEC a proposal which was signed respectively by Dixon and Yates, whereby they agreed to form a new corporation which would finance and construct generating facilities from which 600,000 kw. of electric power would be delivered to TVA at the Tennessee line for the account of AEC. The sponsors proposed that the new corporation enter into a contract with AEC for a term of 25 years under which the power would be furnished upon payment of a base capacity charge of $9,626,000 per annum, plus an energy charge which was to be subject to adjustment, plus reimbursement of State, Federal, and local taxes to be paid by the new corporation. The proposal stated that the contract would provide that AEC would make arrangements with TVA for the receipt by it and the delivery to AEC in kind of the power and energy to be supplied by the new company. The proposal is in evidence as defendant's exhibit 23 and is made a part hereof.

72. On February 26, 1954, Wenzell conferred with Raben of Sullivan & Cromwell. Wenzell related that his work as a consultant with the Bureau of the Budget had been finished in the fall of 1953, but that he was called back to the Bureau again the following January for a brief period to do what he could to expedite the submission of a proposal by some private utility companies, and that his current role with the Bureau was substantially finished. Wenzell then

showed Raben a copy of the sponsors' proposal and the draft of his February 24 interest opinion letter. He explained that, in his capacity as consultant to the Bureau of the Budget, he had obtained information from First Boston as to the interest rates on the financing of the project and had passed the same information on to Dixon and to the Bureau of the Budget. He then asked whether Raben saw any objection to First Boston's signing a formal opinion letter along the lines of Wenzell's February 24 draft. Raben [fol. 384] replied that the question was purely academic since, in point of fact, Wenzell had already supplied the information to the Bureau and to Dixon, and the letter would amount to no more than confirmation of the oral information.

Wenzell stated that the sponsors' proposal had not been accepted by the Government and that if a proposal should be accepted, many months might elapse before that occurred. He also informed Raben that First Boston had not been employed to handle the financing by any of the parties interested in the proposal. He then inquired whether any problems would arise if it developed in the future that a proposal was accepted by the Government and First Boston was requested to arrange for the sale of the debt securities. Thereupon, Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. He also advised that if the proposal was later accepted and First Boston was requested to handle the financing, the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee. Finally, he told Wenzell that he should keep Dodge and Hughes informed about any developments in the matter, including any decision which First Boston might later make as to handling the financing of the project.

On the same day Raben telephoned to Dean, who was in Washington, D. C., at the time, to get a confirmation of the advice given to Wenzell. Dean confirmed the advice Raben had given Wenzell in all respects and further stated that he did not see any problem of a conflict of interest, but that there was a question of policy for First Boston to consider. He felt that since Wenzell had served as a consultant to the Budget Bureau, First Boston might well handle the financ-

ing as a matter of public service and not accept any fee. He also stated that First Boston should keep Hughes and Dodge informed on whatever decision was made.

As will hereinafter appear, Wenzell did not resign immediately, nor did he ever submit a written resignation to the Bureau of the Budget. He continued to act as a consultant to the Bureau until April 3, 1954.

73. After the AEC received the sponsors' proposal of February 25, AEC asked the Budget Bureau for its views. [fol. 385] On February 26, Hughes introduced Canaday, Seal, and Barry, representing the sponsors, to Carl H. Schwartz, Chief of the Resources and Civil Works Division of the Budget Bureau. Hughes stated that the sponsors' representatives would be available to answer questions, and told Schwartz that he wanted a memorandum containing an analysis of the proposal made and delivered by March 2, 1954.

During the discussion which followed, the Bureau staff submitted several questions, including an inquiry as to how the power, which was to be delivered to the AEC at Memphis, would serve AEC's needs at Paducah. In reply, Seal drew a sketch, indicating that the power would move into the Memphis area where it would be used by TVA and would release power supplied from other parts of the TVA system, so that the power thus released could flow into the Paducah area for use by AEC.

After the meeting with the sponsors' representatives, the Bureau staff continued its analysis of the proposal throughout the weekend, when it was apparent that sufficient information was not available to submit the financial comparision that was desired. Accordingly, on Monday, March 1, Schwartz telephoned Hughes, who was in New York. Hughes said that Wenzell would be in Washington that day and would see Schwartz.

The members of the AEC staff also began a review of the sponsors' proposal of February 25. On February 27, 1954, Cook telephoned Dixon, learned that the base capacity charge in the proposal had been computed on the basis of an interest cost of 3½ percent on funds to be borrowed, and obtained some information regarding the proposed energy charge. During the conversation, it was arranged that

Dixon would send Seal to Washington on the following Monday (March 1) to go over the figures with AEC.

74. Wenzell had not participated in the initial reviews of the proposal by either the AEC or the Budget Bureau staffs, but on March 1, he arrived at the Budget Bureau and was present at a meeting of the staff, which was engaged in completing the review of the proposal and in the preparation of the memorandum to be sent to Hughes. Wenzell brought with him Powell Robinson, an assistant vice president of [fol. 386] First Boston's sales department, who attended the meeting. Robinson did not attend as an official or consultant of any Government agency. He made no statement or suggestion during the time he was present.

By the time this meeting was held, Wenzell had completed his assignment in the Bureau as to the cost of money for financing the project. Therefore, his function as a consultant to the Bureau during the period from March 1 until April 3, 1954, when he ceased to serve as a consultant, related principally to the total cost of the project. He took the position that the estimates of costs in the February 25 proposal were too high.

Cook either attended the March 1 meeting at the Bureau or furnished the Bureau staff with the results of his analysis, showing that the project would cost the Government about four million dollars per year more than the AEC was then paying TVA for power furnished by it at Shawnee and that the additional costs were due to increases in construction costs and to taxes. Although Wenzell had participated in the discussion relating to the financial aspects of the proposal, certain questions arose about power engineering, and he stated that he was not qualified to answer such questions. He therefore telephoned Seal and arranged for the latter to meet with the group on the following day. As stated, Cook had previously made arrangements with Dixon for Seal to come to Washington on March 1 to discuss the proposal further with representatives of AEC.

75. On Tuesday, March 2, a meeting in the Budget Bureau was attended by three members of the staff, by Wenzell, and by Seal. McCandless and Schwartz were present from time to time. Seal was shown a copy of the preliminary draft of the analysis prepared by the Bureau staff and was asked a number of questions regarding the basis on which certain

estimated costs in the proposal had been computed and about engineering details involved in the transmission and delivery of power from the proposed new plant. In general, the questions propounded by the Bureau staff indicated the staff's opinion that the sponsors' costs were high as compared with costs of power supplied by TVA for AEC at the Shawnee plant. Seal supplied as much information as he [fol. 387] could but stated that the proposal had been hastily put together. Seal left about noon and conferred with Cook and Meyer of AEC, pursuant to arrangements Cook had made.

After a further discussion by the Bureau staff, a new memorandum was prepared and delivered by McCandless to Hughes at his home that evening. The memorandum stated that in its review, the Bureau staff had conferred with representatives of the sponsors, had briefly discussed the proposal with Cook, and had had the benefit of discussing it at considerable length with Wenzell. It was stated, however, that sufficient information had not been obtained for a refined comparative cost analyis and that active participation by TVA would be required for such an analysis. The memorandum concluded with the statement:

> We believe that the rates involved are sufficiently close that negotiations should be entered into by the parties concerned.

After the meeting ended, Wenzell went to Seal's office in Washington, stated that the Bureau memorandum had been finished, and that Clapp of TVA and Nichols of AEC were to meet with Hughes again on March 3 for further intra-Government discussions.

76. On or about the period of the March 1–2 meetings held in the Bureau, Wenzell had conversations with several members of the staff and expressed concern regarding his situation. On one occasion, Donnelly, who had worked with and supplied Wenzell much of the data used for Wenzell's September 1953 report, told Wenzell that he was "working both sides of the street" and was likely to get in serious trouble. He suggested that Wenzell's actions were attributable to his lack of familiarity with the restrictions applicable to Government employees as compared with practices in private business. Donnelly also mentioned the matter

to Schwartz, his division chief, but never talked to either Dodge or Hughes about it.

While at luncheon with Pilcher and Grahl of the Bureau staff on March 2, Wenzell remarked that he felt that he was in an awkward position in connection with his work on the sponsor's proposal. There was no further mention of the matter at the time, but Grahl learned that Wenzell was [fol. 388] an employee of First Boston, a concern which might be interested in financing the project. Grahl repeated Wenzell's statement to Schuldt, his section chief, and asked whether there was a possibility of a conflict of interest in the situation. Grahl stated that so far as he knew, no conflict of interest existed.

At about the same time, Wenzell also talked to McCandless who knew that Wenzell was an officer of First Boston. Wenzell mentioned that he was somewhat concerned about his situation and intended to speak to Dodge about it. There was no further discussion, but Wenzell later told McCandless that Wenzell had held a very satisfactory conversation with Dodge on the subject of Wenzell's concern.

77. On March 2, 1954, Yates wrote the directors of Southern a confidential memorandum, summarizing the proposal of February 25 and stating that he had made several trips to Washington to talk with representatives of AEC and the Budget Bureau. In the memorandum, Yates further pointed out that after the meetings in Washington, and after discussions with representatives of Middle South, Southern had decided to join in the venture. There was also a statement in the memorandum to the effect that First Boston had advised Middle South and Southern that the sponsors' bonds in the amount of $114,000,000 and bearing interest at 3½ percent could be sold to insurance companies under the current market conditions. This statement was based on the information Dixon had obtained from Wenzell and passed on to Yates before the proposal of February 25 was submitted.

78. Sometime after James and Dixon had discussed the problems that might arise by reason of Wenzell's activities in the Budget Bureau and the possibility that First Boston might participate in the financing of the project, Dixon had told James that someone in First Boston had stated that the question of Wenzell's activities would be presented to Dean

of Sullivan & Cromwell. On February 27, 1954, James spoke briefly to Dean and learned that he was functioning on the problem. During the next week, Dixon informed James that First Boston's counsel had advised Wenzell to resign his position with the Budget Bureau at once.

[fol. 389] Sometime later in March 1954, when Dixon and James called on Hughes in Washington on another matter relating to the project, James raised the question of Wenzell's duality with Hughes. Although James had understood that Wenzell was going to resign, he had learned that Wenzell was occasionally taking part in meetings of the Budget Bureau and James wanted to know why Wenzell was continuing to act as a consultant to the Bureau. Therefore, James pointed out the problem to Hughes in about the same language James had used in his conversation with Dixon during the week prior to February 27, 1954 (finding 68). Hughes made no comment on the matter.

79. Sometime after February 26, 1954, when Raben, with Dean's concurrence, had advised Wenzell to resign promptly as a consultant to the Budget Bureau, Dean told Coggeshall that this advice had been given to Wenzell. Coggeshall did not inquire whether Wenzell had resigned but simply assumed that Wenzell had accepted the advice and submitted his resignation.

On March 3, 1954, Dean inquired of Raben whether Wenzell had resigned. On the same day, Raben telephoned Wenzell and learned that Wenzell had not resigned but was in the process of doing so. Also, on March 3, 1954, Dean talked by telephone with Wenzell, advising him to resign promptly and in writing. At Dean's suggestion, Raben again telephoned Wenzell on March 10, 1954, and found that Wenzell had not then resigned. However, from the statement Wenzell made, Raben decided that Wenzell's decision to resign was an accomplished fact and that the resignation would be submitted momentarily. Consequently, Raben took no further action on the matter.

80. On March 3, 1954, Hughes held a meeting which was attended by Nichols and Clapp and by various members of the TVA, AEC, and Budget Bureau staffs. After a discussion of the general outline of the sponsors' proposal of February 25, it was agreed that AEC and TVA would make

a joint analysis of the proposal. Since the Budget Bureau wished to be kept advised of the progress made on this analysis, Pilcher and Grahl of the Bureau were designated to represent it at the TVA-AEC meetings.

[fol. 390] Also on March 3, 1954, Strauss wrote Dodge in response to a letter sent by Hughes on September 24, 1953. Strauss' reply contained AEC's analysis of the sponsors' proposal of February 25 and stated that AEC had conducted negotiations with the sponsors with the understanding that the purpose of the project would be to relieve TVA of its previous commitments to AEC for the amount of power to be supplied by the private companies and to free that amount of power for normal load growth in the TVA power area. Strauss pointed out that AEC had a firm contract with TVA for the supply of power and that if higher costs to AEC resulted from a cancellation of the contract between AEC and TVA, such higher costs would have to be justified on the basis of advantages to AEC or overall advantages to the United States and that higher executive authority or Congress should make that determination. He concluded the letter with statements that the AEC was divided upon the advisability of using its contractual authority in the manner that had been proposed and that higher authority would presumably determine what course of action would be in the best interests of the Government.

81. On March 4, Cook sent a teletype to Dixon and Seal requesting information needed by AEC for a further analysis of the February 25 proposal. Since Dixon was out of town, Seal prepared the answers to a portion of the questions, obtained information for answering the remainder from a telephone conversation with Dixon, and then prepared a memorandum which he delivered to Cook at the AEC on March 5, 1954.

82. About March 5, 1954, Schwartz and McCandless decided that the Budget Bureau needed the services of a power engineer to assist in the analysis of the proposal. In the afternoon of that day, they spoke to Hughes and suggested that an engineer from either the Bonneville Power Administration or the Federal Power Commission be obtained for that purpose. At the same time, they told Hughes that Wenzell was becoming a little uneasy about his relationship with the Budget Bureau in connection with the proposal.

Hughes indicated that he was familiar with Wenzell's feelings.

[fol. 391] 83. From the evening of March 2 until the morning of March 9, 1954, Wenzell was in New York. During this period he had the following telephone conversations in addition to the calls he received from Dean and Raben:

March 3—with Hughes and Schwartz in Washington;
March 3—with Canaday in Florida;
March 4—two telephone conversations with Seal;
March 5—three conversations with Hughes, Yates, and Seal, each of whom was in Washington;
March 8—with Yates;
March 9—in the morning with Dixon.

Except for the fact that these telephone conversations related in some way to the project, there is no evidence as to what was said in any of them.

84. On March 9, 1954, Pilcher and Grahl of the Budget Bureau met with Meyer and Sapirie of AEC and Kampmeier of TVA to review the draft of the AEC–TVA analysis of the sponsors' proposal of February 25. Wenzell was not present.

After the meeting at AEC, Grahl and Pilcher returned to the Budget Bureau, where they attended a meeting at which Belcher, McCandless, Donnelly, and Wenzell were present. Wenzell had arrived in Washington in the early afternoon. Grahl supplied copies of the draft of the AEC–TVA analysis and orally summarized it. The analysis showed that the proposal would cost seven or eight million dollars more per year than the estimated cost of the proposed TVA plant at Fulton. It was the opinion of all present that the estimates of costs in the proposal were too high and that an attempt should be made to persuade the sponsors to submit a proposal more favorable to the Government. Wenzell was asked to talk to Seal to determine whether the sponsors would submit a better proposal. Sometime later, Wenzell told Seal that the cost estimates in the February 25 proposal were too high.

85. While he was at the Bureau on March 9, Wenzell called on Dodge and stated that he was concerned that if the sponsors submitted a satisfactory proposal and if there was a financing problem connected with the proposal, whether

First Boston would be barred from participating in the financing because Wenzell had been employed as a con- [fol. 392] sultant to the Bureau. Dodge had had little or no contact with Wenzell during the preceding two months. Dodge thought that Wenzell was referring to the possibility of First Boston's participating in an underwriting syndicate with a number of other companies. At that time, there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be obtained before the question of financing would arise. However, Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible. Wenzell replied that he would terminate his work in the Bureau soon. He also said that if anything later developed that would involve First Boston in the financing and if there should be a question of a fee or compensation in connection therewith, he would see that the matter was referred to the Bureau for its prior approval. He added that this promise would also apply to the release of any publicity regarding the handling of the financing.

During the same conversation Wenzell briefly referred to and discussed the overall costs on which the sponsors' proposal was based. Wenzell stated that he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission. Dodge agreed to talk to the Chairman of the Federal Power Commission to see if Adams was available for such an assignment. Wenzell returned to New York on the evening of March 9.

86. On March 10, 1954, Dixon and Yates, along with several representatives of Middle South and Southern, met in Dixon's office to begin preliminary work on a memorandum of understanding between the two companies in connection with their joint proposal. Dixon and Yates had to leave the meeting to attend a conference that day with Linsley, chairman of First Boston's executive committee, in the latter's office, and the memorandum of understanding was completed in their absence.

[fol. 393] Wenzell was present in Linsley's office with Dixon and Yates during the discussion. Dixon was well acquainted with Linsley and had frequently asked for Linsley's opinion on security issues and the condition of the money market. Wenzell arranged the meeting, because Dixon wanted to make certain that the information given to him by Wenzell represented the opinion of some First Boston official like Linsley. Although interest rates may have been mentioned in the discussion, it was concerned chiefly with the current condition of the financial market as related to the financing of an OVEC type of project. No specific financing plan was discussed.

Prior to the meeting, Linsley had never talked about any matters relating to the project with Wenzell, nor had Linsley known that Middle South and Southern had submitted a proposal to the AEC. It was not until April 12, 1954, that Linsley learned of Wenzell's interest opinion draft of February 24, 1954.

87. On March 10, 1954, McCandless telephoned Wenzell, and on the following day Wenzell had a telephone conversation with Seal.

In the afternoon of March 11, 1954, Wenzell returned to Washington to attend another meeting of the Budget Bureau staff. Those present talked about the joint AEC-TVA analysis of the sponsors' proposal, the high costs included in the proposal, and the desirability of lowering the costs. Prior to the meeting, Pilcher and Grahl had attended a session at the AEC for the review of another analysis prepared by the staffs of AEC and TVA.

At the Bureau meeting, it was decided that the AEC should ask the sponsors to review the draft of the TVA-AEC analysis of the proposal and that someone from AEC should arrange for Seal to submit more information on the sponsors' cost figures.

As a result of the meeting in the Bureau, Cook telephoned Dixon on March 12, stating that the Government's analysis of the proposal showed that there was quite a disparity in the costs set forth in the proposal as compared with an estimate of what it would cost TVA to provide an equivalent capacity at the Fulton site. Cook stated that the principal elements of the cost difference were the capital costs used in [fol. 394] the demand charge and the sponsors' use of the

TVA formula for computing the energy charge. Dixon replied that the sponsors would be happy to discuss the matter further and that he would have Seal and Canaday, who were then in Washington, call at Cook's office and go over the points mentioned with Cook. After receiving a telephone call from Dixon, Seal and Canaday met with Cook, who gave them a copy of the draft of the AEC-TVA analysis of the proposal, with the understanding that it would be returned on March 15 or 16, along with the sponsors' statements as to any inaccuracies found in the Government's analysis. Cook also requested that the sponsors' representatives be prepared to furnish their minimum cost proposal at the same time.

88. Wenzell remained in Washington overnight on March 11 and returned to New York the following day. He remained there until Tuesday, March 16, 1954.

On Monday, March 15, 1954, Wenzell had a long-distance telephone conversation with McCandless in Washington. The record also indicates that on the same day Dixon placed a call in Washington for Wenzell, who was in his New York office at the time, and that Wenzell later attempted to return the call. The evidence does not show whether the call was completed.

89. On March 15, 1954, the final draft of the joint AEC-TVA analysis of the sponsors' proposal was prepared and sent to the Bureau the next day in the form of a memorandum from Meyer of AEC to Grahl of the Budget Bureau. On March 16, 1954, representatives of the sponsors, including Dixon, Yates, Canaday, Barry, Smith, and James, met with Dodge in the conference room of the Bureau. Wenzell, who had returned to Washington that morning, was also present at the meeting. The group met to discuss the results of the joint TVA-AEC analysis, a copy of which had been previously given to Seal and Canaday by Cook.

While the meeting was in progress, Grahl called Dodge into the hall to show him a copy of the final draft of the AEC-TVA analysis received that day from AEC. At Dodge's instruction, Grahl handled one copy of the draft to Wenzell.

In the meeting, the sponsors' representatives urged Dodge to have an independent analysis made of the February 25 [fol. 395] proposal, whereupon Wenzell suggested that

Adams of the Federal Power Commission be requested to make the analysis.

90. On March 16, 1954, several representatives of the sponsors met in Dixon's hotel room in Washington and prepared a draft of a letter to Nichols of AEC in reply to the joint TVA-AEC analysis of the sponsors' proposal. A copy of the draft found in Yates' files has in his handwriting at the top of the letter the word "tentative" followed by his initials and the words "Wash.—March 16". Also in his handwriting below this statement is a series of initials and names listing Hayden Smith, Barry, Yates, Dixon, James, Canaday, and Wenzell.

The testimony with respect to the persons who were present and who participated in the drafting of the letter is vague.

Dixon recalled that a meeting was held in his hotel room to draft the letter and that the draft was taken to the Bureau of the Budget, where the meeting described in the preceding finding was held with Dodge; Dixon said he doubted whether Wenzell was present when the letter was drafted.

James could not remember how the draft was prepared, where, or by whom, but his time account shows that on the preceding day, March 15, he worked on an answer to the AEC-TVA analysis of the sponsors' proposal. His notation indicates that the preparation of the draft may have been started the preceding day.

Canaday was sure that he had seen the letter but had no other recollection regarding it.

Neither Seal nor Barry could recall that he saw the letter or participated in its preparation.

Wenzell's recollection was that he did not meet with the sponsors' representatives in Dixon's hotel room.

Although it has not been shown by a preponderance of the evidence that Wenzell was present at the meeting in the hotel room, he was handed a copy of the draft on March 16, 1954, and he made several changes in the letter in his own handwriting. His copy of the draft with his handwritten changes thereon is in evidence as defendant's exhibit 265.

The letter was never prepared in final form, signed by the sponsors, or sent to the AEC.

[fol. 396] 91. Pursuant to arrangements made between the

Bureau and the Federal Power Commission, Adams began acting as a technical consultant to the Bureau on March 19, 1954, and on the following day was engaged in the study of the several analyses that had been made.

92. Wenzell was in New York from March 17 to March 23, 1954. On March 22, Hughes telephoned him "to make sure that he (Wenzell) had turned everything over to Adams." There is some evidence that Wenzell had a telephone conversation with Seal on the following day, March 23.

On March 23, Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day. McCandless also telephoned Adams, stating that Wenzell would call on Adams and discuss with him the cost of money for financing the type of plant that was then being considered. During the meeting between Adams and Wenzell, the subject of the discussion generally was the cost of money for the bonds involved in financing the proposed plant. Wenzell also talked with Roberts, an assistant to Adams. Wenzell returned to New York the same evening.

93. After Adams had made an independent analysis of the February 25 proposal on the basis of the material furnished him, Adams, McCandless, and other staff members of the Bureau met with Seal on March 24, 1954, at which time Adams stated that the figures in the proposal were considerably higher than a reasonable estimate of costs to the sponsors. Adams then asked Seal to develop basic estimates for the cost of constructing a plant and other facilities to provide the services contemplated in the proposal, and Seal agreed to confer with the sponsors regarding this request.

94. The desk pad kept by Wenzell's secretary shows that on March 24, he had telephone conversations with McCandless, Seal, and Canaday, but there is no evidence regarding the nature of the conversations. The record also shows that there was another telephone conversation between Seal and Wenzell on March 26.

Since Adams had been called in by the Bureau to advise it on the costs of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954.

[fol. 397] On March 30, Wenzell had telephone conversations with Yates and Canaday. Also on March 30, Wenzell talked by telephone with McCandless, who asked Wenzell

to be present at a meeting to be held at the Budget Bureau on April 3, 1954.

95. By the time the meeting of March 24 between Adams and Seal was held, it was clear to the sponsors that their proposal of February 25 would not form an acceptable basis for the negotiation of a contract. Following Adams' suggestion to Seal, a group of executives from Middle South and Southern, together with engineers from Ebasco and Southern, worked from March 26 to about April 1, 1954, on the preparation of detailed cost estimates covering the construction of a power plant at West Memphis, Arkansas. These cost estimates were used as a basis for the sponsors' proposal of April 10, 1954. There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared.

96. On April 1, Seal and engineers representing the sponsors met with Roberts and Adams in the latter's office and presented the detailed basic cost estimates that had been prepared by the sponsors. These estimates were discussed and reviewed.

On April 2, Hughes met with Adams, Roberts, and McCandless, and it was agreed that Adams would continue his study and be prepared to give a rough outline of his conclusions at a meeting to be held with Messrs. Dixon and Yates on April 13, 1954.

97. On April 2, 1954, McCandless made a telephone call to Wenzell in New York, and on Saturday April 3, Wenzell returned to Washington. On that date, he attended a meeting held at the Bureau, where Hughes, McCandless, Adams, Dixon, Yates, Seal, and Canaday were also present. The meeting had been called by Hughes for the purpose of discussing the sponsors' new cost estimates. As a result of Adams' analysis, it was agreed that the revised cost estimates were better than those contained in the proposal of February 25 but that further refinement of the figures was required. Dixon and Yates were told that if they could submit a new firm proposal close to the revised cost esti- [fol. 398] mates, the Budget Bureau would feel that the new proposal would deserve serious consideration. Thereupon, Dixon and Yates agreed to outline a proposal for further discussion. Although the record is not entirely clear on the

point, it appears that during the meeting, Wenzell confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money.

98. During the afternoon of April 3, Wenzell saw Nichols and Cook at the AEC. Nichols told Wenzell that the sponsors had by that time come close to submitting acceptable figures. He suggested that Wenzell encourage the sponsors to refine their figures and to submit a proposal based on a fixed price for the construction of new facilities, with details as to the basis upon which both the demand and energy charges were calculated. Nichols also mentioned cancellation provisions and said that the AEC could not consider a proposal that was not firm as to capital costs nor one which did not contain cancellation provisions acceptable to the AEC. Nichols told Wenzell that he would be glad to meet with Adams and the sponsors when they were prepared for further discussions.

The meeting was arranged by a telephone call from Hughes to Nichols. Cook understood Wenzell was present as a representative of the Budget Bureau.

Wenzell returned to New York that evening. It was his last trip to Washington in connection with the project.

99. During the second period of his service as a consultant with the Budget Bureau, i. e., the period from January 18, 1954 to April 3, 1954, Wenzell made 11 trips from New York to Washington and return. He did not follow any regular or consistent practice in the manner in which he submitted bills for his travel and subsistence expenses. Although the Government had agreed to pay his transportation expenses and a per diem for subsistence, most of the bills were submitted to First Boston and paid by it. The following is a summary of the dates on which each trip began and ended and the manner in which his travel and subsistence expenses were billed and paid:

(1) January 18, 1954—all expenses paid by First Boston.

(2) January 19-January 20, 1954—all expenses paid by First Boston.

[fol. 399] (3) February 4, 1954—the Government paid Wenzell's transportation both ways, but First Boston defrayed his other expenses.

(4) February 7-February 8, 1954—First Boston paid Wenzell's transportation to Washington and all subsistence

expenses of the trip. The Government paid his transportation from Washington to New York.

(5) February 22-February 23, 1954—First Boston paid Wenzell's transportation fare from New York to Washington and all subsistence expenses of the trip. The Government paid his fare for travel from Washington to New York.

(6) March 1-March 2, 1954—the Government paid his transportation both ways, but First Boston defrayed all other expenses of the trip.

(7) March 9, 1954—all expenses were defrayed by First Boston.

(8) March 11-March 12, 1954—First Boston paid all expenses of the trip.

(9) March 15-March 16, 1954—First Boston defrayed all expenses of the trip.

(10) March 23, 1954—First Boston defrayed all expenses of the trip.

(11) April 3, 1954—First Boston paid all expenses of the trip.

100. After the meeting of April 3 with Adams and Roberts, the sponsors' representatives reviewed their basic estimates and had new cost figures available by April 6, 1954.

On April 5 and 6, Adams and Roberts discussed the technical aspects of the revised cost estimates with representatives of the sponsors.

On April 6, Hughes, McCandless, and Roberts met with Dixon and Yates, at which time the sponsors gave a general outline of a second proposal which they were preparing to submit. The sponsors began the actual drafting of this proposal in Washington, D. C., on April 6.

Also, on April 6 there was a meeting at AEC attended by Nichols, Cook, Dixon, Yates, Adams, and Roberts. The sponsors had a preliminary summary which indicated that in the second proposal, the annual charges to AEC, including estimated taxes, would exceed the AEC annual cost under the AEC-TVA contract at Paducah by $1,669,000. [fol. 400] The annual charge was based upon a facilities cost of $107,250,000. It was agreed that the sponsors would start the preparation of a definitive proposal to be reviewed at another meeting on April 8, 1954. It was further agreed that, after such review, Nichols would present an analysis of the new proposal to the members of the Atomic Energy

Commission and that there would be a further discussion with Hughes, so that the Bureau could then make a policy determination as to the course of action to be followed.

On April 7 and 8, Adams and Roberts conferred with AEC staff members and representatives of the sponsors on certain technical aspects of the sponsors' cost estimates and proposed contract provisions.

On April 8, Adams and Roberts, along with Cook and Meyers, met with a group of the sponsors' representatives, including Seal, Canaday, and Barry. The sponsors presented a draft of their second proposal and after the draft had been reviewed paragraph by paragraph, it appeared that all the questions raised by the Government's representatives could be resolved with two exceptions which related to (1) the provision that AEC could not resell the power, and (2) the termination of the contract 11½ years after operations commenced.

101. About April 8, 1954, Dixon asked Hallingby to again check on the availability and cost of debt money for the proposed project. As he had done in February (finding 62), Hallingby talked to various investment bankers and institutional investors and advised Dixon that the debt financing could be obtained at an interest cost of approximately 3½ percent.

102. On April 10 there was an all-day meeting at the AEC. Nichols, Cook, and Meyer represented the AEC, while Adams and Roberts attended as consultants for the Bureau of the Budget. For the sponsors, Dixon, Yates, James, Canaday and Seal were present. The sponsors withdrew the proposal of February 25 and presented the draft of a second proposal based on their revised cost estimates. During the meeting, all aspects of the second proposal were reviewed. The sponsors agreed to several modifications which were to be set forth in a formal proposal to be sumbitted by them under the date of April 10, 1954.

[fol. 401] During the meeting, Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be 3½ percent, but he further stated that if it developed that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols took the position

that if the actual cost of money to the sponsors was less than 3½ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate.

The cost of money, to which both Dixon and Nichols referred, is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market. As will hereinafter appear, the actual cost of the money borrowed was 3⅝ percent for MVG's bonds and 3¼ percent for its notes.

103. After the meeting of April 10, the sponsors made a few changes in the proposal and then submitted it to the AEC on Monday afternoon, April 12, 1954, although it was dated April 10, 1954.

The second proposal, like the first proposal, was an offer, whereby the sponsors, in response to the President's budget message, agreed to contract with the AEC for the construction of an electrical generating plant and other facilities near Memphis, Tennessee. The capacity of the plant in both proposals was the same. However, the second proposal differed from the first in several respects.

In the first proposal, the capital cost figures were based on a study which had originally been made for the Mississippi Power & Light Company in connection with an offer it made to TVA. Since that offer related to a plant having 450,000 kw. capacity, the cost figures in the February 25 proposal were adjusted upward to provide for a plant of 600,000 kw. On the other hand, the capital cost figures in the April 10 proposal were based upon estimates prepared by Ebasco for the actual cost of constructing a plant of the desired capacity at West Memphis, Arkansas.

The proposal of February 25 referred to and compared the sponsors' capital cost with TVA's estimated costs for the construction of the proposed plant at Fulton, Tennessee, [fol. 402] whereas the April 10 proposal did not mention a comparison of costs with the TVA Fulton plant.

In the first proposal, the base capacity charge was stated as $9,626,000, whereas the base capacity charge in the second proposal was $8,775,000.

The proposal of February 25 stated that the energy charge and other terms and conditions of the contract, including adjustments, were to be similar to those contained in AEC's

contract with TVA for such service, but in the April 10 proposal, the energy charge was stated in specific figures and the terms for the adjustment thereof were set out in some detail.

104. The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal. Wenzell was not present in Washington at any of the sponsors' meeting during which the proposal was drafted. As already stated, he returned to New York on April 3 and his activities in connection with the April 10 proposal thereafter consisted of the following:

(a) Several days before April 12, 1954, when the sponsors delivered the proposal to the AEC, a representative of the sponsors either gave Wenzell a copy of the proposal for his examination or called him by telephone and read to him the following paragraph contained in the April 10 proposal:

> We have received assurances from responsible financial specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon the arranging of such financing.

The above-quoted sentence was the portion of the second proposal in which Wenzell had a real interest. Whether the sponsors gave him a copy of the proposal or whether the sentence referred to was merely read to him, he compared the statement on financing in the second proposal with that in the first proposal, ascertained that the second proposal contained substantially the same provision on the subject, and knew that it was based upon the interest rate of 3½ percent that he had obtained from First Boston.

(b) It was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and appendix C to the Power Contract shows that the cost [fol. 403] of money is the largest component of cost included in the capacity charge. In view of that fact and Dixon's knowledge that the conditions in the money market change from time to time, he felt that it was necessary to get current information at the time the sponsors were working on the final details of the April 10 proposal. Therefore, on April

9, 1954, he telephoned Wenzell, asking him to get the informed judgment of First Boston on the current cost of money. On the next day, April 10, Dixon again talked with Wenzell by telephone and was told by Wenzell that it was the judgment of the First Boston that the interest rate would be 3½ percent. This information was relied upon by the sponsors in the drafting of the second proposal.

105. On Saturday, April 10, 1954, there was a long distance telephone conversation between McCandless and Wenzell, but the record does not show what was said by either of them.

Wenzell felt that his relationship with the Budget Bureau terminated on April 10, 1954, the date of the sponsors, second proposal.

106. Wenzell performed no services for the Budget Bureau after April 3, 1954. During the period of his services which began on January 18 and ended on April 3, 1954, he did not consider that he was advising parties whose interests were in conflict. He did not feel that by his meetings and telephone conversations with representatives of the sponsors, by obtaining and giving to them First Boston's opinion on the cost of interest, by preparing and showing them the February 24 draft of an opinion on interest rates (finding 67), and by engaging in the other activities which have been detailed in the foregoing findings, he was giving advice and assistance to parties whose interests were different from those of the Budget Bureau, because he felt that the sponsors' interests and the Government's interests in all of these matters were common.

E. Retainer of First Boston and the Decision as to its Fee

107. On the morning of Monday, April 12, 1954, there was a meeting in Linsley's office at First Boston, at which Linsley, Wenzell, Dixon, Hallingby, Yates, Miller and Smith were present. At the meeting, the sponsors' representa- [fol. 404] tives stated that they were preparing to submit their proposal to the AEC and that they wanted First Boston to give them a letter confirming the oral opinion of the interest rates given by Wenzell to Dixon on April 10. It was agreed that First Boston would give an appropriate written opinion. Dixon also asked First Boston to furnish

him a statement of First Boston's views on the procedures for securing a commitment for debt financing of the type and in the amount contemplated by the sponsors.

At the meeting, Linsley learned for the first time from Wenzell about the interest opinion letter which the latter had drafted on February 23.

After the meeting, the sponsors' representatives went to Washington and submitted the proposal to the AEC on the afternoon of April 12, 1954. At the meeting of April 12, Wenzell considered that since his services with the Bureau had ended on April 10, he was acting as a representative of First Boston.

108. On January 14, 1954, when Hughes had requested Wenzell to perform some additional work for the Bureau of the Budget, Woods was told by Wenzell that he had been requested to return to Washington and perform services for the Bureau for a few days. At the time, Woods thought that the work was simply a completion of Wenzell's previous assignment. Therefore, Woods indicated no objection and made no further inquiry. Woods was out of the United States from the end of January 1954 until about March 16, 1954. During Woods' absence from the country, Wenzell discussed the project with Miller from time to time. Aside from Wenzell's conversations with Miller and the discussion Wenzell had with Coggeshall on February 23, 1954 (finding 70), there is no evidence that Wenzell discussed his activities on the project with any officer of First Boston until April 12, 1954, when Woods had lunch with Wenzell. During the luncheon, Wenzell related generally what he had been doing in Woods' absence. Wenzell also told Woods that he was then back with the buying department of First Boston.

By the date the luncheon was held, Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal.

[fol. 405] 109. On April 13, 1954, Hallingby requested Miller to arrange for First Boston to sign the formal opinion letter regarding interest, as discussed the previous day. Using the Wenzell draft of February 24, James prepared a draft of a letter to be signed by First Boston. His draft was erroneously dated March 14, 1954, instead of April 14, 1954, and he erroneously gave the date of the sponsors' pro-

posal as April 14, rather than April 10, 1954. The latter error was carried into the letter signed by First Boston.

With minor changes, the letter was typed at First Boston, signed by Linsley as chairman of the executive committee, and delivered to James at a meeting held in Linsley's office on April 14, 1954, at which Linsley, Miller, Wenzell, and James were present.

The letter read as follows:

April 14, 1954.

Mr. E. H. Dixon,
President, Middle South Utilities, Inc.
2 Rector Street, New York 6, N. Y.

Dear Mr. Dixon:

You have furnished us with a copy of the proposal dated April 14, 1954, addressed to the Atomic Energy Commission by Middle South Utilities, Inc. and The Southern Company regarding the sale to the AEC of 600,000 kw of electric power through the creation of a new generating company which would undertake the construction of the necessary facilities. You have advised us that you estimate the capital requirements of the new company for facilities and working capital at around \$107,250,000, and that you propose to finance the new company on the basis of approximately 95% debt and 5% common stock equity. The equity to be paid in is to be \$5,500,000 and is to be owned by Middle South Utilities, Inc. and The Southern Company, either directly or by their operating subsidiaries and, possibly, by other utility companies. You have also advised that you want to arrange for up to \$120,000,000 of debt capital in order that you may have some cushion for contingencies.

You have asked us to advise you as to the cost of such debt securities on the basis that the power contract with the AEC outlined in said proposal will be for a term of 25 years and will be supplemented by a contract between the proposed generating company and the sponsoring companies under which the latter will agree to take and pay for sufficient power to service the debt

securities to the extent that sales to AEC or to others [fol. 406] may not be sufficient to do so, and on the basis that the first mortgage bonds will mature 30 years after completion of the new plant (estimated at approximately 36 months after commencement of construction) and will be amortized through a level debt service type of sinking fund, which will have retired about 75% of the bonds 25 years after completion of the facilities and 100% by maturity.

It is our opinion that under the foregoing circumstances and under existing market conditions, such debt securities can be sold by the Corporation to institutions at an interest cost of not to exceed 3½% per annum.

It is understood that bond proceeds will be taken down over the period of construction of the facilities, which is estimated to be approximately three years.

Very truly yours, —— ——, Chairman Executive Committee.

DRL/g.

On one copy of the letter in evidence the figure "14" in the date "April 14, 1954" is circled, and there is a handwritten notation "10" above, followed by the initials "AHW" and the date "5/12/54". These corrections were made by Wenzell on an office copy on May 12, 1954, to show that the date of the proposal was April 10 rather than April 14, 1954.

110. Dixon left New York on April 13 and did not return until about April 22, 1954. On April 14 Miller began preparation of the material Dixon had requested on April 12. Miller asked Hallingby for information on the prospective load growths of Middle South and Southern. Hallingby obtained the information in piecemeal form, and before all of it was assembled, Miller left for Puerto Rico and did not return until April 22, 1954. In Miller's absence, Hallingby had several telephone conversations with Wenzell between April 15 and April 22, 1954, in which Hallingby gave the remainder of the information sought by Miller to Wenzell. There were additional telephone conversations between Hallingby and Wenzell on April 27, April 29, May 5, and May 7.

On April 23, 1954, Wenzell conferred with Miller regarding the project, but the record does not show the nature of the discussion.

[fol. 407] 111. About the middle of April 1954, James E. Whittemore, head of the public utilities department of Lehman Brothers, an investment banking firm in New York, learned that Middle South was contemplating supplying power to AEC, and he thought there might be an opportunity for Lehman Brothers to participate in the financial arrangements. Accordingly, he made a solicitation by telephone conversation to Hallingby on or about April 15. Whittemore obtained some information about the probable extent of the financing but he was later called back and told that Middle South was not in a position to discuss financial arrangements at that time. On April 22, 1954, Whittemore and another member of his firm, met Hallingby in an effort to have Lehman Brothers' services considered in connection with the financing of the project.

On April 28, Whittemore and his assoicate met with Dixon, Yates, and Hallingby in the offices of The Southern Company, at which time the ability and the desire of Lehman Brothers to take part in the financing of the proposed new company were discussed. No decision was made regarding the employment of Lehman Brothers as financial agent at that time. A short time later, Dixon discussed the matter with several of his directors, and they decided that Lehman Brothers had some talents that would be helpful in connection with the financing of the project.

112. When Miller returned to his office on April 22, 1954, he learned that Dixon was trying to get in touch with him or Linsley, who had also been out of his office during the latter part of April.

On Friday, May 7, 1954, there was a meeting at First Boston between Dixon, Yates, Hallingby, Woods, Linsley, Coggeshall, Miller, and Wenzell. Dixon stated that he was disturbed that First Boston had not presented its views to the sponsors regarding a proper financial plan for the project and that First Boston had done little toward setting forth its views in a memorandum. There followed a discussion regarding the preparation by First Boston of a memorandum as to the types of securities to be issued and the nature of the financing. Woods planned to use several of

First Boston's offices as a small task force to prepare the memorandum and to approach the banks and insurance [fol. 408] companies in the event First Boston was retained to perform the service.

Dixon introduced the idea at the meeting that if First Boston was to arrange for the financing he would like to have Lehman Brothers associated with First Boston in the undertaking. First Boston was not pleased with this suggestion. Woods stated that he would have to consider the idea and discuss it with his associates.

113. On May 11, 1954, Dixon met Woods and Coggeshall at a luncheon, where Woods stated that First Boston was not particularly anxious to act as financial agent if Lehman Brothers was to be associated in the work and that First Boston did not need the assistance of any other concern. He suggested that it might be just as well if First Boston withdrew from the undertaking. Woods further stated, however, that if Dixon felt that it would be undesirable for Lehman Brothers to handle the matter alone, First Boston was willing to be associated with Lehman Brothers on the conditions that First Boston would have the dominant position so far as authority was concerned and would also to have the senior position with respect to advertising and the division of fees. He left it for Dixon to decide how the arrangement and the conditions stated were to be effected. In the financial community, the senior position in advertising is a matter of importance. Woods considered at the time that if the handling of the financing was successfully consummated by First Boston, the accomplishment would be valuable from an advertising standpoint and would add to First Boston's store of experience. Woods also felt that the advertising might result in First Boston's obtaining other business of the same kind.

The next day, Dixon advised First Boston (which had had no direct dealings with Lehman Brothers) that the sponsors desired to have First Boston and Lehman Brothers act as financial agents on the conditions that had been specified by Woods.

114. Shortly after the meeting of May 7, Miller began drafting a plan for the debt financing. Although Miller had the responsiblity of preparing the memorandum, he discussed it with Wenzell who participated to some extent

in the work assigned to Miller. After Miller had discussed [fol. 409] a preliminary draft with Dixon and Hallingby, First Boston proceeded to complete a memorandum outlining a financing plan that was satisfactory to the sponsors.

On May 18, 1954, the final draft of the plan was discussed at a meeting at the offices of Middle South, where Woods, Miller, and Wenzell of First Boston, representatives of Lehman Brothers, and various representatives of Middle South and Southern were present.

It was decided that the fee for the financial agents would be divided on the basis of 60 percent to First Boston and 40 percent to Lehman Brothers and that First Boston would have the preferred position on any advertising.

About May 20, 1954, First Boston and Lehman Brothers first approached the institutional investors. These negotiations continued until the middle of August 1954, when the finance committee of the Metropolitan Life Insurance Company authorized the purchase of bonds, and the terms of the loan had been agreed upon to the extent of providing a basis for negotiation of the bond purchase agreement and related documents. Miller and Einsley acted for First Boston in these negotiations. Ultimately, the financing was arranged at an interest rate of 3.58 percent instead of at 3½ percent, the rate which had been previously used in the opinions given by First Boston as to the cost of the debt money.

115. On May 19, 1954, Woods issued to certain First Boston personnel a memorandum setting forth the agreement he had concluded with Dixon on or about May 12, 1954, regarding First Boston's association with Lehman Brothers in the financing arrangements. The memorandum read as follows:

Black Book Memorandum

MISSISSIPPI VALLEY GENERATING COMPANY

It is planned to organize this Company for the purpose of building a power plant on the Mississippi River opposite Memphis. Its sponsors will be Middle South Utilities, Inc. and The Southern Company. These Companies will own its entire stock, 80% by Middle South and 20% by Southern Company. The entire output of the plant will be sold under contract to the Atomic Energy Commission.

[fol. 410] First Boston and Lehman Brothers have been requested by the managements of the sponsoring Companies to act in a general advisory capacity with respect to all financial aspects, and specifically to act as agents in placing the debt of the new Company with insurance companies and banks.

Any fee which may be paid is to be divided 60% FBC and 40% Lehman, and it is understood that FBC is the leader in the business and will have senior position in all advertising and publicity.

Responsibility for this matter will be in the hands of Mr. Linsley and Mr. Paul Miller.

(S) George D. Woods.

116. The testimony is conflicting as to the date when First Boston was first retained by the sponsors to handle the financing for the project. The greater weight of the evidence shows that Dixon understood and believed that First Boston had been retained as of April 12, 1954, when First Boston was requested to issue the letter quoted in finding 109 and to advise Dixon on the procedure for obtaining a commitment of funds. On the same day Miller began to assemble information obtained from Hallingby. Dixon had tried to get in touch with both Miller and Linsley about April 22, 1954, and when the meeting of May 7 was held, Dixon expressed disappointment because First Boston had not proceeded with the preparation of the memorandum of a financial plan. However; the consummation of an agreement between the sponsors and First Boston was delayed when Dixon stated on May 7 that he would like to have Lehman Brothers associated with First Boston on the task of raising the money.

There never was any written agreement of retainer, but the evidence shows that all questions were resolved by May 12, 1954, when Dixon and Woods agreed that First Boston and Lehman Brothers would act as financial agents for the sponsors.

117. During the period between May 25 and the middle of June 1954, Woods, in several conversations with Linsley, took the position that it would be the better policy for First Boston not to charge a fee for its services as financial agent for the sponsors. Linsley agreed with Woods. About June 15, 1954, Woods telephoned Dean, stating that

First Boston had decided as a matter of policy not to charge [fol. 411] any fee. There was some resistance to Wood's decision by the other members of First Boston's executive committee, and the matter was discussed by the committee on July 1 and again on September 22, 1954. At a regular meeting held on October 21, 1954, the executive committee took the following action:

* * * * * * *

> In line with the discussions which took place in the Executive Committee meeting on July 1, 1954, and after due consideration, the Executive Committee confirmed our earlier decision not to accept compensation for our services (except remuneration for out-of-pocket expenses) in connection with the *Direct Placement* of up to $93,000,000 principal amount of bonds and up to $27,000,000 of unsecured notes for *Mississippi Valley Generating Company*.

* * * * * * *

The decision not to charge a fee was based on Woods' conclusions that the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in connection with its power policy, and that First Boston should not charge a fee for assistance in obtaining funds that were designed to obviate the necessity of Federal expenditures for the expansion of TVA.

Until November 17, 1954, neither Lehman Brothers nor any representatives of the sponsors had notice of First Boston's attitude regarding the charging of a fee.

118. On November 17, 1954, there was a meeting at the offices of Middle South where Hallingby, Linsley, and Miller were present, along with Whittemore and Gutman of Lehman Brothers. During a discussion about the financial agents' fees, Linsley indicated that First Boston would not charge a fee. It was the position of Lehman Brothers that only a very modest fee should be charged, but Lehman

Brothers did not agree that there should be no fee paid to the agents. The matter was left open for further discussion.

119. On November 19, 1954, Miller and Hallingby had a conversation in which Miller disagreed with Hallingby's [fol. 412] proposal that a small fee would be better than none. Miller also tried to make it clear to Hallingby that First Boston would expect no fee regardless of what arrangements the sponsors made with Lehman Brothers.

120. On February 18, 1955, Senator Lister Hill of Alabama, made a speech, criticizing the activities of Wenzell and First Boston. On the following day, Dean was asked to go to Woods' apartment where he met Woods, Coggeshall, and Wenzell. Coggeshall and Woods drafted a statement which First Boston released to the press and which was carried in the news on the next day, Sunday. With respect to fees, the release stated:

> Neither The First Boston Corporation nor Mr. Wenzell received a fee from the Bureau of the Budget nor are we to be paid for services in connection with the generating company financing. * * *

On March 16, 1956, Hallingby expressed dissatisfaction to Miller that Middle South had not been notified before the story was released. Lehman Brothers were also displeased with the news story and felt that they should not have been apprised of First Boston's decision through a news story.

121. Althoug' Hallingby advised Dixon as to what transpired at the meeting of November 17, 1954, Dixon did not understand that First Boston had made a final decision not to charge a fee. On May 5, 1955, he informed Linsley and Miller that he was preparing for his appearance before the SEC regarding the debt financing of MVG, that he anticipated questions relating to fees would be asked, and that he desired a clear statement of First Boston's position on the matter.

On the same day, Dean met with Miller, Woods, and Linsley, at which time Dean suggested that if there was any doubt about the decision which First Boston had made, the doubt should be removed by a clear and explicit letter

to Dixon. Dean drafted a letter which, with slight revisions, was signed and sent to Dixon on May 6, 1955. The letter, signed by Woods, read as follows:

> You have again raised the question with us whether we wish to accept a fee for our services in connection [fol. 413] with the senior financing of Mississippi Valley Generating Company, which has taken the form of the direct placement of a maximum of $92,914,000 principal amount of $3\frac{5}{8}\%$ First Mortgage Bonds, and a maximum of $27,086,000 principal amount of $3\frac{1}{4}\%$ Notes under a Bank Credit Agreement.
>
> From its inception we have regarded our services in this matter as falling within the category of the public interest. We therefore confirm that we wish no fee for our services.
>
> If you wish to reimburse us for our out-of-pocket expenses, they have amounted to date to $244.84. There may be certain further out-of-pocket expenses in connection with public advertisement of the financing which would only be incurred with your approval.

122. On May 10, Dixon showed a copy of the letter to Lehman Brothers and requested a statement of their position on the matter. The attitude of Lehman Brothers was that the fee should be very modest but that it was a mistake not to charge any fee. However, on May 11, 1955, Lehman Brothers decided that in view of First Boston's decision, Lehman Brothers would not charge a fee.

123. Dixon was surprised by First Boston's decision not to accept a fee for its services as financial agent. The decision was unusual and without precedent in the history of First Boston.

124. On May 11, Canaday appeared before the Arkansas Public Service Commission to testify in support of MVG's application for State approval of its proposed debt financing. He testified in part that the sponsors were using the services of First Boston and Lehman Brothers in working out the terms of the loan and that the financial agents might be paid a fee subject to SEC approval. It was stated that any fees paid would be quite modest.

At the time he testified, Canaday had not been informed of First Boston's letter to Dixon dated May 6, 1955, dis-

claiming a fee. It was not until later that Canaday learned that neither First Boston nor Lehman Brothers would charge a fee.

125. On June 1, 1955, Wenzell resigned from his position in First Boston. First Boston's method of compensating its officers and employees includes a salary plus a bonus, the bonus being based upon the amount of business which the [fol. 414] employee brought to the firm. In 1954, Wenzell received a salary and a bonus from First Boston, but the evidence does not show the amount of his bonus or the basis on which it was computed. In 1953 and 1954, Wenzell owned 200 shares of stock in First Boston, but the stock was in his wife's name.

126. As shown by preceding findings, Strauss knew on January 18, 1954, that Wenzell was an officer of First Boston. At the conference with Wenzell at AEC on January 19, 1954, Cook and Williams knew that Wenzell was employed as a consultant to the Budget Bureau, but Cook did not know until later (a date not established by the record) that Wenzell was an officer of First Boston. At that time, Williams had been given responsibility for handling the project in AEC, and when he resigned on January 31, 1954, Cook assumed that responsibility and continued to discharge it thereafter. Subsequent to January 19, 1954, Wenzell attended five meetings at AEC where it was known that he appeared as a consultant to the Budget Bureau.

On July 7, 1954, during the negotiation of the contract, the AEC representatives were informed that First Boston and Lehman Brothers were acting as financial agents for the sponsors.

In December 1954, the AEC had a representative present at the SEC equity hearings, where it was stated that First Boston had been retained as financial agent for MVG. However, there is no evidence that any representative of AEC had knowledge up to that time that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project, nor that any AEC representatives knew the extent to which the sponsors were aware of Wenzell's activities in that regard.

127. Despite the advice which had been given by First Boston's counsel to Wenzell on February 26, 1954 (finding

72), and the promise which Wenzell made to Dodge on March 9, 1954 (finding 85), neither Wenzell nor any other representative of First Boston ever gave notice to the Budget Bureau that First Boston had been retained as a financial agent by the sponsors or of the terms and conditions upon which the retainer was made.

[fol. 415] There is no evidence that the Bureau of the Budget had notice of the fact that First Boston had been retained as a financial agent of the sponsors until February 18, 1955. From that date until March 10, 1955, the legal adviser to the Bureau had possession of a copy of the transcript of the SEC equity hearings. The transcript showed that First Boston and Lehman Brothers had been employed as financial agents by the sponsors.

128. As stated in a preceding finding, the letter of November 23, 1955, by which the AEC advised plaintiff that AEC refused to recognize the Power Contract as an obligation of the United States, was based upon an opinion which Mitchell, General Counsel of AEC, rendered to the Commission on November 15, 1955. After reviewing the activities of Wenzell, as disclosed in the SEC hearings and in the hearings held by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, the opinion (defendant's exhibit 40) concluded with the following:

> ... My conclusion is that there is a substantial question as to the validity of the contract which can only be settled in the courts.

F. The Decision to Negotiate a Contract on the Basis of the April 10 Proposal.

129. Following the submission of the April 10 proposal, Hughes held a conference with Clapp and Nichols, together with staff members from TVA, AEC, and the Budget Bureau, at which time it was agreed that TVA and AEC would make a joint analysis of the proposal and that Adams would participate for the Budget Bureau. An intensive review and analysis of the proposal was made, and in connection therewith, representatives of the sponsors met with the Government's representatives to discuss aspects of the proposal and furnish additional information when requested.

On April 24, 1954, Hughes sent the President a memorandum, reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors and that the Bureau be further authorized [fol. 416] to instruct TVA and AEC to work out related interagency arrangements.

On April 28, 1954, Hughes and the AEC received a telegram from a group headed by Von Tresckow, stating that they proposed to submit a proposal to AEC and that it would be more favorable than any other of which the group had knowledge. The Von Tresckow proposal was received by AEC on May 27, 1954, and was subjected to a review and analysis during the period June 3 to June 5. As a result, no decision was then made by the Government to negotiate a contract with the sponsors on the basis of the April 10 proposal.

130. On June 14, 1954, a comparative summary analysis of the sponsors' proposal, the Von Tresckow proposal, and estimated TVA costs for the Fulton plant was presented by Hughes and Strauss to congressional leaders in conference with the President. At that time, the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors.

On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract on a basis generally within the terms of the proposal, and instructing TVA and AEC to work out the necessary contractual, operational, and administrative arrangements between the two agencies so that operations under the contract would be carried out in the most economical and efficient manner.

131. On June 30, 1954, AEC wrote the sponsors in part as follows:

> As Mr. Cook informally advised Mr. Dixon this date, your proposal dated April 10, 1954, offering to furnish 600,000 kw of firm power in the Memphis area con-

stitutes a satisfactory basis for negotiation of a definitive contract.

We are ready to begin negotiations.

The sponsors did not know of the defendant's decision until June 30, 1954. The sponsors' proposal was a firm offer but, [fol. 417] as indicated by the quotation above, the AEC letter was not an acceptance; it was simply a statement that AEC was ready to begin contract negotiations.

132. On April 15, 1954, three days after the submission of the proposal, the law firm of Cahill, Gordon, Reindel & Ohl, with the assistance of the law firm of Winthrop, Stimson, Putnam & Roberts, commenced the drafting of a proposed contract. Shortly after June 30, AEC was advised that the sponsors had prepared a draft of the proposed contract and were ready to begin the negotiations. In order to have the draft printed and allow the AEC an opportunity to consider it, it was agreed that the negotiations would begin on July 7, 1954.

G. The Negotiation of the Power Contract

133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.

The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 10, 1954, the Government insisted on two new contract provisions, and it was

doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase [fol. 418] the facilities at any time after three years from the effective date of the contract.

134. On August 18 Nichols and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. At the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as "major concessions from the company" which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

135. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the [fol. 419] Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

136. Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation.

III. The Replacement Defense [2]

137. By a letter agreement entered into August 23, 1951, and a contract effective as of July 1, 1954, TVA agreed to supply substantially the entire output of 1,205,000 kw. from its generating plant at Shawnee, Kentucky, to the AEC installation at Paducah, Kentucky. The contract was for an initial term expiring on January 1, 1966, and there was a provision for annual renewals thereafter through January 1, 1977. EEI had also built a plant at Joppa, Illinois, in the vicinity of Paducah for the purpose of supplying AEC's Paducah installation with 735,000 kw. of electricity. Paducah is approximately 180 miles north of West Memphis, Arkansas. TVA was also supplying a block of 1,730,000 kw. to AEC at its installation at Oak Ridge, about 360 miles east of West Memphis. In 1953, the AEC also had an installation at Portsmouth, Ohio, which was wholly outside the TVA service area. Power for the Portsmouth installation was supplied by a plant constructed by OVEC. As

[2] Paragraph 24 (B) of defendant's answer.

previously stated, AEC had no installations at or near Memphis, Tennessee, and it had no plans in 1953 for further ex- [fol. 420] pansion of its existing facilities or for the construction of new facilities.

138. By written contract entered into on November 23, 1935, between TVA and the city of Memphis, TVA agreed to supply all of the electrical needs of the city for a period of 20 years, beginning June 1, 1938, and ending June 1, 1958. Under the contract, Memphis could not buy electricity from sources other than TVA. In 1953 TVA was supplying Memphis with about 350,000 kw., the peak load, but it was estimated that these requirements would reach 520,000 kw. by 1960. As long as there was a possibility of securing power in adequate quantities from TVA, Memphis desired to continue the relationship. It was for the purpose of serving the commercial, industrial, and domestic needs of Memphis and its environs that TVA had sought an appropriation to construct a plant of 450,000 kw. at Fulton, Tennessee, some 20 to 30 miles northwest of Memphis on the east bank of the Mississippi River. As already stated, TVA's request for funds for the Fulton plant had been eliminated from the budget for the fiscal year 1953 by the Truman Administration; efforts to obtain appropriations for the same purpose had been defeated in Congress in 1953 and 1954, and the Eisenhower Administration eliminated TVA's request for funds for the Fulton plant from the budget for the fiscal year 1955.

139. Findings 22, 23, 36, 37, 38, 39, 40, 41, 42, 43, 51, 71, 75, 80, 84, 87, 95, 96, 103, 129, 130, 131, 132, 133, 134, and 135 are pertinent to defendant's replacement defense and are incorporated in Part III hereof. In summary, these findings relate to the Eisenhower Administration's policy on power during 1953 and 1954; the elimination of TVA's request for funds to construct the Fulton plant from the budget for the fiscal year 1955 and TVA's position thereon; defendant's decision to have AEC contract with private utility companies for the construction of new electric generating capacity for AEC at Paducah, so that AEC could in turn release a like amount of power to TVA; the defendant's meetings with Dixon and McAfee; the President's budget message of January 21, 1954; the determination that the need for the proposed new power plant was to relieve TVA

[fol. 421] in the Memphis area rather than to satisfy any increased needs of AEC; Hughes' suggestion to Dixon, that he make a study of the costs required for the construction of a plant near Memphis under contract with the AEC; the sponsors' proposal of February 25, 1954, and the analysis thereof by the Budget Bureau, AEC and TVA; the withdrawal of the proposal of February 25 and the submission of the sponsors' proposal of April 10, 1954; defendant's review and analysis of the second proposal and of the Von Tresckow proposal; the President's decision that AEC should begin negotiations for the purpose of entering into a contract within the terms of the second proposal; Hughes' direction to AEC to proceed with the negotiation of the contract; Hughes' instructions to TVA and AEC to work out the necessary arrangements for operations under the contract, and the negotiation of the contract.

140. As stated in finding 39, Mississippi Power & Light Company, one of the subsidiaries of Middle South, made a written proposal to TVA on October 15, 1953, by which it offered to erect a plant near Memphis to supply TVA with a block of 450,000 kw. of power for a term of 20 years in lieu of TVA's construction of the Fulton plant. This offer was never acted upon by TVA.

On February 3, 1954, Nichols suggested to Yates that Southern make a similar offer to TVA. Accordingly, on February 9, 1954, Yates wrote Clapp an offer in which Southern agreed to build a plant at Guntersville, Alabama, for the purpose of supplying TVA with 20,000 kw. of power at that location. Yates' letter stated that the President's budget message contemplated that some 500,000 to 600,000 kw. of the load in the TVA service area was to be supplied from other sources by the fall of 1957. Copies of the letter were sent to Hughes and Nichols. Clapp replied on March 1, 1954, stating that Yates had misinterpreted the President's budget message relating to TVA in that the message contemplated that AEC would relieve TVA of 500,000 to 600,000 kw. of power that TVA was obligated to supply AEC, in order that the power thus released could be used to meet the normal load growth in the TVA service area. Yates sent copies of the reply to both Hughes and Nichols.

[fol. 422] On February 19, 1954, the Resources and Civil

Works Division of the Budget Bureau sent Hughes a memorandum setting forth that division's analysis of both offers. The memorandum stated in pertinent part as follows:

> Following is a brief analysis of proposals made to the Tennessee Valley Authority by the Southern Co. for the Georgia Power Co. and by the Mississippi Power and Light Company. Both utilities propose to sell large blocks of firm power to the TVA at transmission voltage at points on the southern border of the Federal system. Although neither offer involves direct sale to the Atomic Energy Commission or other wholesale customers of TVA, both offers could be considered as a means of achieving the objectives of the President's budget message statements to the effect that arrangements are being made to reduce, by the Fall of 1957, existing commitments of TVA to AEC by 500,000 to 600,000 kilowatts. Power brought in at the southern edges of the TVA system could be used to meet loads there with equal amounts of power from the Shawnee plant in turn being allotted to AEC service at Paducah, Kentucky, under appropriate agreements between TVA, AEC and the utilities involved.

On the following day, January 20, 1954, in a meeting at which Hughes, Dixon, McAfee, and others were present, it was decided that Dixon would prepare a study showing the cost of constructing a power plant across the river from Memphis for the purpose of generating 450,000 to 600,000 kw. of power. At that time, Hughes indicated that AEC would be the Government's contracting agency for the project.

141. As stated in finding 80, when Strauss wrote Dodge on March 3, 1954, regarding the sponsors' proposal of February 25, Strauss stated that the AEC was divided upon the advisability of using its contractual authority in the manner that had been proposed.

On April 16, 1954, after the sponsors' proposal of April 10 had been submitted, Commissioners Smyth and Zuckert of AEC sent Hughes a joint letter reading as follows:

> Dear Mr. Hughes:
>
> On April 15, 1954, the Chairman of the Atomic Energy Commission, Mr. Strauss, sent you a letter,

outlining an analysis of the negotiations for certain power to be furnished by Middle South Utilities, Inc., and The Southern Company.

[fol. 423] Under this proposal, the Atomic Energy Commission's contracting power would be used as a vehicle for the supply of 600,000 kw. of power in the Memphis area.

With the knowledge of the other Members of the Commission, we are taking this opportunity to bring to your attention our personal view that the proposed action involves the AEC in a matter remote from its responsibilities. In an awkward and unbusinesslike way, an additional federal agency would be concerned in the power business.

The proposal under discussion is an outgrowth of the response to the President's budget message, and your letter of December 24, 1953, requesting the AEC to explore the possibility of reducing existing commitments of the TVA to the Commission. In the course of that exploration, it was determined to be unwise to disturb the AEC arrangements with TVA, upon which our production schedules depend. Since that determination, the explorations have taken a different course.

The present proposal would create a situation whereby the AEC would be contracting for power, not one kilowatt of which would be used in connection with Commission production activities. The creation of such a contractual relationship would place upon the Commission a continuing responsibility during the 25-year life of the contract for stewardship in respect to matters irrelevant to the mission of the Commission.

It has been our observation in government administration that arrangements which are obviously incongruous at the outset tend to become even less clear-cut because no one can foresee what contingencies may arise over a long term of years. In addition, the proposed action certainly seems a reversal of the sound philosophy embodied in the community disposal legislation recently sent forward to Congress. One motivation for that legislation was the desire to eliminate responsibilities not essentially involved in the Commission's sober and exacting principal mission.

Of course, if the President or the Congress directs the Commission to accept such a responsibility, we will endeavor to discharge it fully.

Sincerely, (S) Eugene M. Zuckert, Member, Atomic Energy Commission. (S) Henry D. Smyth, Member, Atomic Energy Commission.

[fol. 424] The statement in the letter to the effect that none of the power to be contracted for by AEC would be used in connection with any AEC production activity was based on the facts that AEC had already entered into firm contracts for power to be supplied to it at Paducah, Kentucky, and at other installations; that AEC had decided not to alter the existing contracts, and that the power to be produced by the project was to be generated near Memphis and used in that area where AEC had no requirements for power. Commissioners Smyth and Zuckert felt that the project was not relevant to any needs of the AEC.

142. On April 15, 1954, Strauss wrote Dodge, reviewing the discussions and negotiations with the sponsors and submitting AEC's analysis of the proposal of April 10, 1954. Strauss stated that AEC had proceeded on the basis that th[illegible] would be no cancellation of the AEC–TVA Paducah contract for the amount of power to be supplied by the project; that AEC would contract with the sponsors for the power needed by TVA for load growth in the Memphis area on the basis of replacement, and that this approach would assure AEC of continuity and reliability of power at its Paducah installation. In addition, the letter stated as follows:

* * * * * * *

Consideration of the revised proposal by Dixon-Yates should not overlook the following:

(a) The AEC presently has a firm contract with TVA for [illegible]pply of power.

([illegible]) Reliability and continuity of power supply to the AE[illegible] must be protected.

(c) The entire difference in cost between the Sponsor's revised proposal and the TVA contract is accounted for by taxes.

(d) AEC would expect the Bureau of the Budget to obtain the concurrence of TVA to all provisions of the proposal, and any subsequent definitive contracts relating to TVA.

(e) The proposal provides that the power factor at point of delivery shall be maintained by TVA at no lower than 93%. To maintain this power factor, it may be necessary for TVA to provide reactive KVA in the Memphis area or a penalty may be applied in the form of increased demand charges.

[fol. 425] With the understanding that arrangements would be made through the Bureau of the Budget for TVA to enter into a 25-year contract with AEC to take the power provided for under this proposal subject to all provisions including cancellation, the AEC could enter into a contract with the Sponsors to provide TVA with 60 MW needed for its load growth on a basis of replacement. However, it is our position that any costs involved to AEC over and above the cost of power under our present contract at Paducah should be borne by TVA. Otherwise, the TVA would be further subsidized through an operating expense appropriation to the AEC.

We feel that higher executive authority or Congress should make this determination.

* * * * * * *

143. On April 22, 1954, Cook sent Nichols a memorandum outlining a number of items for discussion with TVA regarding the sponsors' proposal of April 10. In the memorandum Cook stated that before the proposal of April 10 was accepted, AEC should require TVA to agree to accept the power made available under the project for 25 years and that the AEC–TVA Paducah contract should not be changed insofar as TVA's responsibility to serve AEC with power was concerned. However, he suggested that the contract might be modified to provide for the delivery of the Dixon-Yates power, the metering and billing, and the relationship between TVA, AEC, and MVG. He also recommended that under the agreement to be made by TVA and AEC, TVA should pay all of the costs relating to the delivery of power to TVA from the project and that AEC should continue

to be liable for all charges to TVA under the Paducah contract.

Attached to Cook's memorandum was a suggested form of agreement to be signed by AEC and TVA. As hereinafter shown, the two agencies never reached an agreement on the matter.

144. On April 20, 1954, Wessenauer, Manager of Power for TVA, wrote to Cook, calling attention to the extraordinary and time-consuming arrangements that would be required for modifying the AEC–TVA Paducah contract and for transferring the Dixon-Yates power to AEC in the event the sponsors' proposal was accepted by the Government.

[fol. 426] 145. (a) As heretofore stated, on June 16, 1954, Hughes directed AEC to negotiate the contract with the sponsors and instructed TVA and AEC to work out the necessary interagency arrangements (finding 130). Hughes' letter of June 16, 1954, was directed to Harry A. Curtis, Vice-Chairman of TVA's Board of Directors, and stated that TVA would be expected to bear all the costs necessary to receive the power at delivery points and all other costs required for the distribution of the power throughout the TVA transmission system, but that AEC would pay all local, State, and Federal taxes provided for in the contract. His letter further stated that AEC's contract with TVA at Paducah would remain in full force and effect.

(b) On the same day, Hughes wrote Curtis another letter which read in part as follows:

> As set forth in another letter I am sending to you today, arrangements are being made by the Atomic Energy Commission to purchase power under a proposal made by Middle South Utilities, Inc., and the Southern Company. Under this proposal an additional 600,000 KW of firm power will be delivered to the TVA system by the latter part of calendar year 1957 to take care of AEC loads. This arrangement will make available to TVA 600,000 KW of power for use in its system in exchange for power it will be delivering to AEC at Paducah.

(c) On July 2, 1964, Curtis replied to Hughes' letters of June 16, pointing out that TVA had had no opportunity to comment in advance on the instructions given to AEC and

TVA and that in TVA's view, the letters were inconsistent with the President's budget message. After quoting from that portion of the presidential message relating to TVA (finding 41), Curtis' letter read in pertinent part as follows:

> As we understand the situation, it was in accordance with this statement in the President's budget message and because the power was to be supplied for AEC's use that the AEC, at the direction of the Bureau of the Budget, solicited the Dixon-Yates proposal, conducted the discussions, and assumed the responsibility for the terms of the proposal. The power was not intended for purchase by TVA, either for the general load growth of the area or to supply new defense loads [fol. 427] such as the Oak Ridge addition projected shortly thereafter. * * *

The instructions of June 16, at least as interpreted by AEC in the testimony before the Joint Committee on Atomic Energy, would not result in furnishing power for AEC as contemplated by the President's budget message. As AEC interpreted the instructions, and that interpretation should be corrected if it is in error, the 600,000 kw of power that would be delivered at the middle of the Mississippi River near Memphis from a plant which would be constructed by Dixon-Yates in Arkansas would be for TVA's use, and not AEC's. According to AEC, it would pay the bills of the Dixon-Yates combine, but adjustments would be made between TVA and AEC whereby the entire cost of this block of power supply would fall upon TVA, including the extra costs required to absorb the power in the TVA system, except for the "local, state, and Federal taxes payable under the terms of the contract" between AEC and Dixon-Yates, such taxes to be reimbursed to Dixon-Yates from AEC funds. Rather than increasing its commitment from private utilities and reducing its commitments from TVA as contemplated in the President's budget message, AEC is to protect its present power supply sources by maintaining its full contract rights for power to be supplied by TVA. It would be contracting with the Dixon-Yates group, therefore, not on its own behalf but primarily for TVA.

In addition, the letter stated that the Dixon-Yates' proposal would add $3,685,000 a year to the Government's cost, that the location of the proposed plant was far inferior to the Fulton site, and that the most serious aspect of the whole arrangement was the lack of control which the TVA Board would have over the costs that TVA would incur.

The letter concluded with a request that the matter be reconsidered.

(d) Under date of August 18, 1954, Hughes replied to Curtis' letter, stating that TVA's request for reconsideration, on the ground that the instructions previously transmitted by Hughes were inconsistent with the President's budget message, resulted from a misinterpretation of the proposal. The letter stated that the proposal contemplated that AEC would purchase power to replace the power which it would otherwise obtain from TVA and that the proposal [fol. 428] did not contemplate that AEC would buy power to supply TVA's requirements; that the arrangement was essentially an interchange of power in kind between AEC and TVA in that AEC would purchase power from the sponsors and trade it to TVA for an equivalent amount of power delivered to AEC at its installations.

In addition, Hughes' letter stated that AEC would pay the costs of procuring the power from the new plant and transmitting it to contract delivery points, while TVA would be expected to bear the cost necessary to receive the power at the delivery points and all costs necessary to distribute and use the power in its transmission system.

Hughes' letter concluded with the following:

> It is expected that the AEC will reduce its commitments from TVA in the amount of approximately 600,000 kilowatts of capacity as contemplated in the President's Budget Message. This will involve a modification of the present contracts between AEC and TVA to reduce the AEC demand by 600,000 kilowatts, with a corresponding reduction in the amounts of energy required by AEC. In exchange, TVA will agree to receive in the Memphis area the same amounts of capacity and energy for the account of AEC and to deliver equivalent amounts, in total, to AEC at its plants.
>
> As explained in my letter of June 16, 1954, the reduction of 600,000 kilowatts in TVA's present commit-

ments to AEC will make this amount of capacity available to TVA for use in its system. Of this total additional capacity, 500,000 kilowatts will be available to meet the estimated growth in industrial, municipal, and cooperative loads in the TVA area through calendar year 1957. The remaining 100,000 kilowatts will be applicable against the increase of 135,000 to 175,000 kilowatts in AEC load at Oak Ridge, which has developed since the President's Budget Message was transmitted and which, in accordance with my letter of June 16, 1954, TVA should plan to take care of with the new generating capacity currently scheduled for installation through 1957.

Under the arrangements described above, there appears to be full provision for control by the TVA Board over the costs TVA would incur. The contemplated arrangements will keep the lines of responsibility clear between AEC and TVA. Inasmuch as AEC will have the responsibility for contracting for the power pro-[fol. 429] duced by Middle South-Southern, it will bear the costs for producing that power. The Tennessee Valley Authority (in exchange for equivalent power delivered to AEC) will receive and use the power through its transmission system and, therefore, should bear its own costs associated with such transmission and distribution. We understand the TVA responsibility for efficient and economical performance to apply to the use of the power and the operating arrangements from the point TVA receives it as exchange power from the Middle South-Southern producers. I am confident TVA will cooperate with AEC in working out arrangements which will result in maximum efficiency and economy for the Government.

It will be greatly appreciated if you will now promptly meet with AEC as they have requested to work out the necessary detailed arrangements. If we can be of further help in any of these matters please let us know.

(e) On August 26, 1954, Curtis responded to Hughes letter of August 18, stating that Hughes' letters of June 16 and August 18 presented quite different proposals for considera-

tion by TVA. As to TVA's understanding of these differences, the letter stated in part as follows:

> Under the June 16 letters, we understood that the President had ordered AEC to enter into a contract with Dixon-Yates to provide 600,000 kw of capacity surplus to the requirements of its Paducah installations and useful solely for resale to TVA. We understood that except for the item of taxes, the cost of such power would be charged to TVA. Because we believed that such an arrangement transferred the responsibilities of this Board to the members of the Atomic Energy Commission and destroyed the basis of our accountability under the TVA Act by proposing a major and improvident contract on our behalf, we protested. Our understanding that the capacity proposed to be provided by Dixon-Yates was for the use of TVA, not AEC, was not an irresponsible conclusion; it was fortified by the sentence in your letter of June 16 which stated that "AEC will maintain in force its full contract with TVA at Paducah." We assumed this to mean that AEC would continue to use the low-cost energy available from TVA's Shawnee plant while purchasing higher cost power from Dixon-Yates for resale to TVA at the higher cost. The Hearing before the Joint Committee on Atomic Energy on June 16–17 offered no evidence that our [fol. 430] interpretation was in error. In fact, it appeared that the Atomic Energy Commission spokesmen agreed with us. Mr. Nichols, for example, testified as follows:
>
> We (AEC) would be billed for that power by Dixon-Yates, and we would take that bill and, still having our contract for Paducah, we would get a credit on our Paducah contract for the amount of the bill from Dixon-Yates, less the taxes. (Hearing, p. 970.)
>
> In contrast, the second sentence on page 2 of your August 18 letter states "This (the Dixon-Yates arrangement) will involve a modification of the present contract between AEC and TVA to reduce the AEC demands by 600,000 kw with a corresponding reduction in the amount of energy required by AEC." You also say that "inasmuch as AEC will have the responsibility for con-

tracting for the power produced by Middle South-Southern, it will bear the cost for producing that power." If these latter statements represent the final basis for the discussions which you propose between TVA and AEC, then it would appear that the extra costs of several million dollars a year to be incurred by the Government in accepting the Dixon-Yates proposal are the primary responsibility of other Government agencies rather than of this Board. The only costs to be borne by TVA in such an arrangement would be related to the benefits to be received by TVA and the specific amounts would be appropriate matters for negotiation between TVA's staff and the staff of AEC.

In this connection we have a deep concern which we present with great reluctance, but which we feel an obligation to express. TVA has negotiated many contracts with AEC; our representatives have met across the table from the staff of AEC and have negotiated in good faith. So far as we know, there was for a long period an unblemished record of mutual confidence and good will between these two agencies. Under conditions which have prevailed in the past this Board would need no further assurance that your August 18 letter does in fact represent a final conclusion and that it is now contemplated that TVA will be involved in this transaction only as the interchange agent to receive power from Dixon-Yates and deliver power to AEC. We would leave the collateral questions of cost adjustment to negotiation, confident that equity would prevail.

The letter concluded with the statement that TVA was concerned about the possibilities of productive negotiations between AEC and TVA because of several matters, including [fol. 431] the scant attention paid to the judgment of TVA's representatives in the analysis of the sponsors' proposals, Cook's failure to reply to the Wessenauer's letter of April 20, 1954 (finding 144), and the fact that AEC had made available to TVA only selected excerpts from the draft of the contract.

A copy of Curtis' letter was sent to Strauss.

146. The sponsors' proposal of February 25, 1954, contained the following statement:

* * * * * * *

There is an additional consideration. Since the power to be released by AEC would appear to be for TVA's use in West Tennessee in general and the Memphis area in particular (see the TVA testimony with respect to its proposed Fulton plant), a practical and economical situation can be created if deliveries by the new corporation to you or for your account are made over an interconnection with TVA in that area, and if TVA in turn delivers a like amount of power to the Commission's Paducah facilities from their Shawnee Station. This can be accomplished by locating the facilities of the new corporation near Memphis. This will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in an area which, except for the AEC demand, is already oversupplied with power.

* * * * * * *

The sponsors' second proposal of April 10, 1954, read in part as follows:

As stated above, our proposal has been formulated with the end in view of supplying power and energy to your Commission, an agency related in the main to national defense, for use in pursuance of your statutory purposes. At the same time, however, we have attempted by our proposal to assist the Government in the solution of a broader overall problem. TVA testimony before Congressional Committees indicates that the power released by your Commission upon accept- [fol. 432] ance of our proposal will be of use to TVA in West Tennessee, and particularly in the Memphis area. It will therefore be both practical and economical if deliveries by our new generating company are made to you or for your account over interconnections with TVA in the Memphis area, and if TVA, in turn, delivers a

like amount of power to your Paducah facilities from its Shawnee Station. To do this, the facilities of the new company will be located near Memphis. This plant site will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in the Paducah area which, if the AEC demand were cancelled, would be oversupplied with power.

147. The term "replacement," which appears in the Power Contract, was coined in the AEC and used by Nichols in his testimony before the Joint Committee on Atomic Energy in June of 1954, when amendments to the Atomic Energy Act of 1946 were being considered. At that time, Nichols pointed out that the initial plan which the Government had considered was one in which the private power companies were to build a plant at or near the AEC installation at Paducah, so that TVA's obligation to supply power there could be released and the power used to meet the needs of TVA's other customers; that as a result of discussions with the utility representatives and TVA, it was found that the need for the power was in the Memphis area and, that from an engineering point of view, it was decided that it would be better to locate the source of the new power near where the bulk of it was to be used. During the same hearings, Nichols stated that the AEC–TVA Paducah power contract would not be cancelled, but that AEC would contract with the sponsors to supply power needed by TVA for its load growth in the Memphis area in replacement of the power which TVA was supplying to AEC at Paducah. It was Nichols' conception that the agreement to be entered into between AEC and TVA after the Power Contract was executed would not involve a physical release of the power [fol. 433] which TVA was supplying to AEC at Paducah but that TVA would no longer submit bills to AEC for the demand and energy charges for power delivered to AEC at

Paducah and would credit AEC for an equivalent amount of power supplied through the new plant to be erected by MVG. He understood also that the agreement between AEC and TVA would have to include some adjustment for the increased costs incurred by TVA in obtaining power through the new project.

148. The Atomic Energy Act of 1954 was approved August 30, 1954. Section 164 of the Act (68 Stat. 951) provides in pertinent part as follows:

> The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof.

149. As stated in finding 133, contract negotiations began July 7, 1954, and continued to November 11, 1954, when the Power Contract was signed. TVA did not participate directly in the negotiations but was consulted by the AEC representatives from time to time. During the negotiations, changes in the successive proofs of the contract directly involving TVA were considered and agreed upon by the negotiators.

The various proofs of the contract and the minutes of the sessions show that it was never contemplated that TVA would be a party to the Power Contract.

Most of the drafts of the contract contained the following clause:

> Whereas, the AEC is making arrangements with TVA whereby TVA will accept deliveries of power and energy hereunder for or on account of AEC; * * *

[fol. 434] Each proof of the contract contained a counterpart of so much of section 3.02 of the Power Contract as provides:

> Section 3.02 *Delivery Arrangements with TVA and Utilization of Power and Energy:* The AEC will arrange with TVA for the acceptance by TVA of power and energy scheduled by or for the AEC and delivered by the Company hereunder and for the delivery of such amount of power and energy by TVA to the AEC; * * *

150. The last "Whereas" clause of the Power Contract read as follows:

> Whereas, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the project;

On November 4, 1954, Nichols submitted to the Joint Committee on Atomic Energy the October 1st proof of the contract and stated that the foregoing "Whereas" clause had been drafted to read as quoted above at the suggestion of the Attorney General's office.

151. In addition to those described above, the contract contained numerous provisions relating to TVA and to the receipt and acceptance by TVA of the power to be generated under the contract.

In its preamble, the contract recited the President's budget message relating to TVA and to plaintiff's intention to furnish power to AEC or to TVA for the account of AEC in replacement of power furnished by TVA to AEC.

Section 1.02 of the contract provided that the primary delivery points should be established by agreement among AEC, plaintiff, and TVA at the Tennessee-Arkansas State line between Shelby County, Tennessee, and Crittenden County, Arkansas.

Section 1.03 provided that secondary delivery points should consist of existing and future direct and indirect connections between the systems of plaintiff and of subsidiaries of the sponsors and TVA.

Section 2.03 stated that plaintiff would cooperate with AEC and TVA in coordination of design and operation of [fol. 435] line terminal positions, circuit breakers, and system relay protection and communication and telemetering and control equipment, etc.; that AEC might designate TVA from time to time as its authorized representative to act for AEC in various technical aspects of the contract, and that it was contemplated that any such designation would be worked out after discussions among AEC, plaintiff and TVA.

Section 3.01 provided for the delivery of reduced amounts of energy in the event one or more generating units were shut down by *force majeure* or for overhaul, required reasonable notice of the starting up or shutting down of any such unit, and provided that reasonable notice for the purpose of this section would be established by agreement among plaintiff, AEC and TVA.

Section 3.03 provided that AEC would make arrangements with TVA so that reactive power should not be taken from plaintiff in excess of that which plaintiff had agreed to supply.

Section 3.07 provided that plaintiff would cooperate with AEC and TVA to maintain the agreed upon voltage at primary delivery points so that it would not vary more than plus or minus 5 percent or such other limits as might be mutually agreed upon.

Section 6.01 provided that plaintiff would use its best efforts to see that arrangements for secondary delivery points between subsidiaries of the sponsors and TVA would provide AEC with substantially the same terms and conditions of test and billing adjustment as were provided for primary delivery points.

Section 7.07 authorized the assignment of the right to power and energy under the contract to TVA with TVA's consent to take it, under certain circumstances, or if TVA did not consent, to cancellation by AEC under the conditions set forth.

Appendix A recited in paragraph "A" that plaintiff proposed to acquire rights-of-way in Arkansas and to construct transmission lines to terminal points at the middle of the Mississippi River in the Memphis area for the purpose of

delivering electric energy to TVA for AEC as provided in the contract.

[fol. 436] In paragraph "D" it provided that the exact number and location of lines to the middle of the Mississippi River and necessary line terminal positions, circuit breakers, system relay protection communications and telemetering and control equipment, would be determined by mutual agreement among AEC, plaintiff and TVA.

Appendix B as to primary delivery points provided that the facilities of plaintiff would be electrically connected to the TVA system at the middle of the Mississippi River near Memphis, Tennessee, and that the exact number and location of primary delivery points were to be mutually agreed upon by AEC, plaintiff and TVA.

Similar provisions existed with relation to secondary delivery points.

In paragraph III this appendix outlined the general method of accounting for energy deliveries and provided it should be agreed upon in detail among plaintiff, AEC and TVA.

The interpretative memorandum of November 11, 1954, provided that the cooperation of the parties contemplated by section 2.03 of the contract would include preparation of operating memoranda or manuals through collaboration of AEC, plaintiff and TVA as might be mutually agreed to be necessary in order to establish operating procedures for the guidance of operating personnel in the several organizations concerned with the carrying out of the provisions of the contract.

The interpretative memorandum further provided that it was the intention that the terms in section 3.01 of the contract, "except as may be mutually agreed to from time to time", and "except upon reasonable notice" with relation to starting up or shutting down any unit, could later be provided for in contemplated agreements among AEC, TVA and plaintiff and be modified from time to time as actual in-service experience was obtained.

152. (a) The authority and power of the AEC to execute the Power Contract and perform the obligations thereby imposed upon it was the subject of an opinion which the Acting Comptroller General submitted to Strauss by letter

of October 5, 1954. The opinion read in pertinent part as follows:

> [fol. 437] At the time the Atomic Energy Act of 1954 was under consideration by the Congress negotiations for the Dixon-Yates contract had already been undertaken by the Atomic Energy Commission, and a question arose whether the authority of the Commission under section 12 (d) of the Atomic Energy Act of 1946, as amended (section 164 of the 1954 act), was broad enough to cover such an arrangement. In order to resolve any doubt on this point Senator Ferguson offered an amendment to the section, the purpose of which was specifically stated to be to authorize the Dixon-Yates contract. Cong. Record, July 19, 1954, p. 10430. The Ferguson amendment was adopted (Cong. Rec., July 21, 1954, pp. 10770-71), and became a part of section 164. * * *
>
> In my opinion the foregoing language of section 164 and its legislative history authorizes the AEC to execute the Dixon-Yates contract, to obligate the United States to make payments as required by the contract, and to make payment of cancellation charges out of funds now or hereafter made available for expenditure to the AEC.

(b) By authorization of the President, the Attorney General of the United States furnished Strauss an opinion respecting the validity of the proposed power contract. The opinion, which was set forth in a letter dated October 20, 1954, stated in part:

> * * * I have no doubt that the contract, which specifically states as its purpose the providing of electric utility services to the Commission, or to TVA for the account of the Commission, in replacement of electric utility service furnished to the Commission by TVA in connection with the construction or operation of the Commission's installations at Oak Ridge, Paducah, or Portsmouth, is manifestly within the scope of the authority conferred upon the Commission by Section 164. * * *

(c) On December 2, 1954, Strauss requested the Comptroller General for a supplemental opinion in view of certain revisions that had been made in the contract after the Comptroller's opinion of October 5, 1954. On December 13, 1954, the Comptroller General submitted to AEC a supplemental opinion, stating that the revisions in the contract did not affect his conclusions of October 5, 1954, with respect to the authority of AEC to execute the contract and to perform the obligations imposed upon it thereby.

[fol. 438] (d) On October 12, 1954, the Acting Comptroller General advised the Chairman of the Joint Committee on Atomic Energy that the execution of the proposed contract was authorized by Section 164 of the Atomic Energy Act of 1954 and that the contract complied with all statutory contract requirements applicable to its execution by AEC. Attached to his opinion was a memorandum containing comments of the various provisions of the proposed contract, including sections 3.04 and 3.05. In the memorandum it was pointed out that these sections of the contract gave AEC the right to sell or dispose of the power to its contractors or to successor project operators for consumption at a project site but that these provisions were meaningless, because no portion of the power was to be consumed at any existing AEC project. It was further stated that while section 3.06 gave AEC the right to transfer the power for use at other Government installations, the right to transfer was limited to power or energy that was no longer required at an AEC project, and that in the event there should be a reduction in TVA's requirements in the Memphis area without a corresponding reduction at an AEC project, AEC could not transfer the surplus power generated by MVG.

It was suggested that the contract be redrafted to conform to the actual situation under which the power was to be delivered.

(e) Prior to the termination of the contract, the United States as *amicus curiae* filed a brief with the Court of Appeals for the District of Columbia on the appeal from the SEC order approving MVG's equity financing. The brief stated in part:

> If there were any doubt, from the face of the statute, that the contract is authorized by the Atomic Energy Act, that doubt would be removed by the legislative his-

tory, which demonstrates beyond question that Congress, in enacting Section 164 in its present form, understood that it was authorizing this very contract.

* * * * * * *

The essential emptiness of their position [that this was not a replacement contract under Section 164] is emphasized by the fact that the arguments which they advance are but a stale rehash of matters thoroughly understood and presented at the time of the Senate debate.

[fol. 439] (f) On January 18, 1955, the Division of Corporate Regulation of SEC filed in the SEC equity proceedings a brief which, after quoting from the legislative history of Section 164 of the Atomic Energy Act of 1954, stated in part as follows:

In view of the foregoing [quotation from the legislative history of Section 164 of the Atomic Energy Act of 1954], it seems absurd to argue that the Power Contract is not authorized by section 164.

(g) On July 11, 1955, the General Counsel of the Atomic Energy Commission furnished the Commission an opinion containing the following:

2. *The MVGC contract is a valid obligation of the Government.*

The MVGC contract was executed pursuant to authority contained in Section 164 of the Atomic Energy Act of 1954, 68 Stat. 951, 42 U. S. C. 2204.

* * * * * * *

The MVGC contract is a contract to provide electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA. In its purpose and terms, it is clearly within the express authority of Section 164 of the Atomic Energy Act. The legislative history of the Atomic Energy Act makes is abundantly clear that in enacting Section 164 in its present form, Congress understood that it was authorizing the contract with MVGC.

153. At a meeting on October 5, 1954, the AEC voted to approve the form of the contract with MVG upon the vote of three commissioners present, two of whom, Campbell and Strauss, voted to approve, and one, Murray, abstained. The fourth member, Dr. W. F. Libby, had taken the oath of office as a member of the Commission on the same day, and he withdrew from the meeting because he felt that he was not sufficiently acquainted with the subject to exercise a judgment upon it.

Thereafter, the AEC voted to execute the contract and the record does not disclose that there were any dissenting votes at the time of final approval.

As hereinafter shown, no agreement between AEC and TVA had been made at the time the Power Contract was [fol. 440] executed, nor had any arrangements among AEC, TVA and plaintiff been concluded.

154. Clapp's term as Chairman of the TVA expired on May 17, 1954, and from that date until September 1, 1954, the Board consisted of two members, namely, Harry A. Curtis and Raymond R. Paty, with Curtis acting as Vice Chairman.

On June 30, 1954, Strauss wrote Curtis, advising that AEC was proceeding with the negotiation of the contract; that before the drafting of certain provisions of the contract was completed, discussions with TVA would be necessary, and that AEC would soon be ready to begin discussions with TVA on the necessary contractual, operational, and administrative arrangements between the two agencies. He designated Cook and Sapirie to represent AEC in the negotiations with TVA and asked Curtis to designate TVA representatives so that plans could be made for the first meeting.

In the meantime, the exchange of correspondence between Curtis and Hughes occurred, and nothing further was done regarding a meeting between the two agencies until after August 31, 1954, when Cook sent a copy of the August 11 proof of the contract to TVA with the statement that the contract was essentially in final form and that before it was executed, AEC planned to have discussions with TVA regarding those portions of the contract which pertained to TVA.

On September 1, 1954, General Herbert D. Vogel took office as Chairman of the TVA Board. On September 3, 1954, he met with Nichols, and the following joint statement was issued by them on that date:

> The Chairman of the Tennessee Valley Authority met in conference with the General Manager of the Atomic Energy Commission today to develop a plan for the negotiation of an agreement between the two organizations in connection with the power to be procured under the proposed Dixon-Yates contract.
>
> The Atomic Energy Commission on August 31, 1954, made a copy of the Dixon-Yates contract available to the staff of the Tennessee Valley Authority which is presently engaged in preliminary work designed to obtain the necessary basic data. There are obviously [fol. 441] many technical details to be resolved before final agreement between TVA and AEC can be consummated but a meeting of the minds has been achieved on all fundamental issues and the TVA will proceed in good faith and as expeditiously as possible to prepare the necessary data, and it is expected that the technical staffs of both organizations will get together for discussions within the next ten days.
>
> The Chairman of the TVA and the General Manager of the AEC are agreed that negotiations can proceed between the two agencies in the same spirit of good will that has exemplified past negotiations.

155. During the period between September 9, 1954 and January 19, 1955, the designated representatives of AEC and TVA met on five occasions in an effort to make an agreement covering the acceptance by TVA of the power and energy supplied by MVG in exchange for the power and energy supplied by TVA to AEC at Paducah, in accordance with section 3.02 of the Power Contract. At the first meeting, a dispute arose between the two agencies as to the interpretation of Hughes' letter of August 18, 1954 (finding 145), particularly with respect to the allocation of the costs involved in the receipt and transmission by TVA of the power supplied by MVG. The cost of the power supplied by MVG exceeded the cost of the power supply which AEC was obtaining at Paducah from the TVA plant

at Shawnee, and AEC took the position that its share of such excess costs should be limited to the costs that would have been present if the MVG plant had been constructed at Paducah and AEC had released to TVA 600,000 kw. supplied to AEC by TVA at that installation. On the other hand, TVA stated that TVA had the responsibility of supplying power to its customers at the lowest possible cost and that it was not justified in paying any more for the power received from MVG than the cost at which TVA could have obtained the power from its proposed Fulton plant. The TVA representatives stated they were willing to balance any benefits which TVA might receive by having the MVG power put into its system in the Memphis area rather than having it released at Paducah against any additional cost which TVA might incur in the receipt and transmission of the MVG power.

[fol. 442] The interagency dispute over the allocation of costs involved, among others, the following matters:

(a) *Investment in Transmission Lines and Transmission Losses.* In order to utilize the MVG power, it would have been necessary for TVA to build transmission facilities at a cost of several million dollars to bring the power from the middle of the Mississippi River to Memphis. The amount of power to be supplied by MVG was 600,000 kw., but the load in the Memphis area varied from 450,000 kw. during some hours to 150,000 kw. during other hours. This would have made it necessary for TVA to carry considerable quantities of power, varying in amounts, to locations about 200 miles distant where the excess power could be absorbed.

(b) *Fuel Costs.* To operate the MVG plant, it would have been necessary to transport coal from the West Kentucky and Southern Illinois fields down the Ohio and Mississippi Rivers to the MVG plant at West Memphis, Arkansas, a greater distance than would have been required for the transportation of coal to TVA's proposed Fulton plant. The question of the assessment of the extra transportation costs had to be solved.

(c) *Additional Power for Oak Ridge.* AEC needed an additional 150,000 kw. of power at its Oak Ridge installation, and the two agencies were unable to decide how much, if any, of the MVG power should be transmitted to Oak Ridge to fulfill that requirement and whether the costs in connection therewith should be allocated, or whether all of

the MVG power should be credited to AEC by TVA against the power bills at Paducah.

(d) *Curtailment of the MVG Power Supply.* Power under the Power Contract was subject to curtailment under some conditions, such as when more than one generating unit was out of service. Also, if there was a delay in the completion of plaintiff's plant, there would be a deficiency of the power supply at Memphis. The representatives were unable to agree as to whether any such deficiencies in the power supply would be borne by TVA or AEC.

(e) *TVA's Cost for Accelerating Construction of the Shawnee Plant.* In the discussions over the division of costs, TVA sought reimbursement of certain fixed amounts [fol. 443] which it claimed it had incurred in accelerating the construction of its Shawnee plant for the purpose of supplying power to AEC at Paducah, but AEC decided that it could not justify the payment of these claimed amounts.

During the discussions between the two agencies, five proposals were presented by TVA and four by AEC. The last interagency meeting was held on January 19, 1955, but one proposal by TVA was submitted as late as April 30, 1955. Although the representatives of both agencies negotiated vigorously and in good faith, they were as far apart at the end of April 1955 as when the negotiations began. Their failure to agree was due to the basic differences in their objectives as explained above.

156. In September 1954, a technical committee composed of representatives of AEC, TVA, and MVG was appointed for working out the technical problems required in the delivery of MVG power to TVA and the transmission of the power in the TVA system. The problems involved included primary delivery points, location of river crossings, terminal positions, metered locations, voltage regulation, and the like.

The committee, designated as the Technical Steering Committee, had conferences on September 28, October 21, and November 8, 1954, and June 20, 1955. One of the proposed routes for the transmission lines involved the placing of transmission towers and lines in the city limits of Memphis, and on December 29, 1954, a TVA representative informed the committee that the city of Memphis objected to the placing of towers and lines within the city limits. As a result, it was necessary for the committee to consider alternate

routes. In the beginning, the work of the committee was delayed by the fact that TVA had no appropriation available during the latter part of 1954 or early part of 1955 for anything except primary engineering or general planning on the problem of receiving and transmitting MVG power. As of May 31, 1955, the TVA members expressed their reluctance to proceed with technical details until AEC and TVA had made an agreement. At the meeting of June 20, 1955, a TVA representative stated that TVA felt that it was not worthwhile to discuss any further details relating [fol. 444] to the connection of MVG power to the TVA system, because TVA had been advised that the city of Memphis intended to build its own plant and that the city's decision had altered previous concepts to such an extent that TVA would require time to make studies of changes in the system that would be required for acceptance of the 600,000 kw. from MVG without the Memphis load. It was agreed that the committee would meet again on August 1, 1955, but before the date of the scheduled meeting, defendant gave plaintiff notice that the contract would be terminated.

157. In 1952 TVA started negotiations with the city of Memphis for the purpose of renewing the 20-year contract which expired on June 1, 1958 (finding 138). As previously stated, TVA had proposed the construction of its Fulton plant to supply power to the city of Memphis. TVA could not build the Fulton plant without a continuing relationship with the city. That relationship was essential to the acceptance of power by TVA under the Power Contract, because the defendant had decided to have the Power Contract executed in lieu of providing funds for TVA's Fulton plant. The negotiations between TVA and the city of Memphis for renewal of the contract ended when Memphis decided to build its own power plant.

As early as December 2, 1954, Frank Tobey, mayor of Memphis, and Thomas F. Allen, president of the Memphis Light, Gas and Water Division, made public statements through the newspapers that if it developed that the TVA was not permitted to continue to supply Memphis with its power needs, the city would construct its own plant.

On December 20, 1954, in the SEC hearings on MVG's equity financing, Allen testified that he did not believe that Memphis would ever depend upon the MVG plant as a source of power. Dixon, Yates, and their attorneys were

present at the time Allen testified. At the hearing, a representative of TVA gave Allen a map prepared by Ebasco, showing the proposed connections of the MVG plant with the TVA terminal stations at the north, south, and east limits of the city of Memphis.

On February 17, 1955, Tobey and Allen made a public statement which was published in a front-page article in [fol. 445] the Memphis Press-Scimitar to the effect that Memphis would not accept power from the MVG plant and that if the construction of the plant was commenced in West Memphis, Arkansas, the city of Memphis would take immediate steps to build its own plant. Similar statements were published in a front-page article in the New York Times on February 18, 1955. Dixon, who was in Washington, D. C., at the time, was familiar with the views expressed by the officials of Memphis and responded by statements which appeared in the New York Times and other newspapers on February 18, 1955, to the effect that the MVG contract was with AEC and that his group never had any intention of selling power to the city of Memphis. He further stated that if the city of Memphis wished to build its own plant, it was privileged to do so.

During the negotiation of the Power Contract, no representative of MVG, the sponsors, or AEC discussed the problems of bringing the MVG power into Memphis with its city officials, or inquired of them whether Memphis would accept and use the power supplied by the MVG plant. The officials of Memphis learned what was contemplated by the Power Contract from a representative of TVA.

158. By a joint letter of March 7, 1955, TVA directors Curtis and Paty wrote Hughes, stating that the power to be supplied under the MVG contract would not be ready by 1957 and that there was no certainty that the power would be available in 1958; that the power contract was in litigation; that after a year of negotiation, AEC and TVA had been unable to agree on a method for handling the power to be supplied by MVG; that TVA had participated in such negotiations on the assumption that the power furnished under the Power Contract would be used to meet the TVA load requirements in the Memphis area, but that the city of Memphis had publicly stated that the city would not accept power generated by the Dixon-Yates plant under any circumstances. Curtis and Paty concluded the letter

with a request that the Budget Bureau reconsider the construction of TVA's plant at Fulton, Tennessee, and stated that such action would permit cancellation of the Dixon-Yates contract. On the same day, Vogel wrote Hughes, [fol. 446] stating that the Curtis-Paty letter was a personal act of the writers and that Vogel did not approve the letter.

By letter of March 17, 1955, to Vogel, Hughes replied that the Dixon-Yates contract was then in effect; that it would accomplish the purposes set forth in the President's budget message, and that there was no reason for exploring other methods to provide additional generating plants for TVA in the same area where replacement power would be furnished to TVA by AEC. The letter also stated that the negotiation of an agreement between AEC and TVA was a matter of two Government agencies working together in the best interests of the country. However, Hughes' letter requested TVA to ascertain as soon as possible whether the city of Memphis would require further service from the TVA system after the TVA contract with the city expired on June 1, 1958.

On April 5, 1955, Vogel wrote Tobey, inquiring whether the city of Memphis intended to renew its contract with TVA. In his reply of May 18, 1955, Tobey stated that under no circumstances would the city of Memphis become a market for Dixon-Yates power, but he failed to indicate whether Memphis would renew its contract with TVA. Instead, his letter stated that Memphis wished to continue as a part of the TVA system and expressed the hope that TVA would obtain the Budget Bureau's approval of the construction of the TVA Fulton plant. A copy of the letter was sent by Vogel to Hughes on June 3, 1955.

159. On June 23, 1955, in a telegram to TVA Allen reported that the city commission had authorized the Memphis Light, Gas and Water Division to take the necessary steps for providing a generating plant of adequate capacity for Memphis. On the same date, the telegram was confirmed by letter to the TVA Board. Notice of the city's action was given by Wessenauer of TVA to Sapirie of AEC.

On June 28, 1955, Vogel replied to the letter and telegram in a letter to Allen, stating that TVA would proceed on the assumption that Memphis would be in a position to handle its own load after the expiration of the contract with TVA on June 1, 1958. A copy of this letter with copies of Allen's

letter and telegram were forwarded by Vogel to Hughes on the same date.

[fol. 447] On June 30, 1955, Tobey and Allen telegraphed to TVA that Memphis would not renew its contract with TVA on the expiration of that contract.

160. On June 30, 1955, Vogel wrote to Hughes, referring to the information received from the city of Memphis and to the city's decision not to renew its power contract with TVA. The letter stated in part:

> Because of the decision of the City it will no longer be necessary for TVA to plan capacity installations to meet the load requirements of the Memphis area. Since the Dixon-Yates plant was proposed as a source of supply for the Memphis load, the City's action eliminates the possibility of using its output in the Memphis area, and the transmission costs involved and other factors would make it impracticable for TVA to utilize MVGC power elsewhere on the TVA system. We believe, therefore, that no arrangements between the Atomic Energy Commission and the Mississippi Valley Generating Company should any longer be predicated on the use of the MVGC plant as a source of supply to TVA * * *.

With his letter, Vogel enclosed a formal resolution which was adopted by the TVA Board on June 30, 1955, and which set forth substantially the same matters as were contained in Vogel's letter.

On the same date (June 30, 1955), the White House made public Vogel's letter to Hughes and the resolution of the TVA Board. The White House release read in part as follows:

> The President many months ago recommended that the City of Memphis develop its own power plant to supply the needs of the people of that area for electric energy. In the absence of any action by the City to accept this responsibility, the Federal Government made the necessary plans to provide adequate power facilities for the Memphis area.
>
> In the light of the notification by the City of Memphis to the Tennessee Valley Authority, the President has requested the Director of the Bureau of the Budget

to confer promptly with the Atomic Energy Commission and the Tennessee Valley Authority to determine whether it is in the interest of the people of the area now to continue or to cancel the Dixon-Yates contract.

[fol. 448] 161. In the light of the action taken by the city of Memphis, Hughes sent letters to both Strauss and Vogel on July 2, 1955. The letter to TVA sought information regarding TVA's proposed plans for new generating capacity and as to any obligations it had for providing back-up power for the city of Memphis in the future. AEC was requested to advise Hughes whether the AEC could make economical use of all or a part of the power that would be made available through the MVG plant and to furnish information on the problems that would be encountered if the contract with MVG should be cancelled. Under date of July 5, 1955, Strauss replied that if AEC was relieved of the proposal to furnish TVA power in replacement for the same amount of power obtained from that agency at Paducah, there would be no economical way for AEC to use the MVG power. He also supplied information as to the problems involved in the event the Power Contract should be cancelled.

162. During a conference with Strauss on July 8, 1955, Dixon left with Strauss a memorandum setting forth Dixon's views on the consequences of the cancellation of the Power Contract. He stated that the only circumstance present and the only reason given for reviewing the Dixon-Yates contract at that time was the action of the city commission of Memphis and the announcement that the city planned to construct its own power plant. In that connection, his memorandum read:

> If the City of Memphis actually builds and operates its own electric facilities and uses it own resources to do so, then there are some changed circumstances. *Absent solid and irrevocable action to that end, there are no new circumstances.*

163. In his reply to Hughes under date of July 5, 1955 (finding 161), Strauss stated the AEC had entered into the Power Contract upon instructions from the President and that if a decision to terminate the contract resulted

from a review of data furnished by TVA and AEC, AEC assumed that the President would issue directions to AEC.

On July 16, 1955, Hughes sent the following letter to Strauss:

> [fol. 449] The President has accepted the commitment made by the Mayor of Memphis at the White House on Monday last that the City of Memphis will construct a power plant adequate to serve the people of his community, and that the City of Memphis will not request any funds from the Federal Government in any way to apply on the cost of construction of that plant. In this situation, there is no longer any requirement for the arrangement made with the Mississippi Valley Generating Company pursuant to my letter of June 16, 1954, to you.
>
> The President has therefore requested me to convey his direction to the Atomic Energy Commission to take immediately the necessary steps to bring to an end the relationship between the Mississippi Valley Generating Company and the United States.
>
> This confirms my oral discussion with you on Monday after the President's decision was made.

Thereafter, on August 1, 1955, Dixon received a letter from AEC, stating that the President had directed AEC to terminate the Power Contract.

164. In the electrical industry, "capacity" is the capability of a plant to generate a certain amount of power, while "energy" is the generation of that power for a specific length of time. Capacity is measured in kilowatts. Energy is measured in kilowatt-hours.

In the power industry, the term "displacement" means the transfer of energy through a power system by a receipt of energy on one edge of the system and the delivery of a comparable amount of energy at another end of the system. The same kilowatt-hours delivered are not necessarily the same kilowatt-hours received. "Wheeling", though not a technical term, is commonly used to describe the process by which a specific block of energy is delivered from a utility on one edge of a system to a neighboring utility on another edge of the same system. Since most electric power systems are interconnected with their neighboring utilities,

one system frequently assists another in transferring blocks of power from a place where there is an excess to another place where there is a deficiency.

Since the purpose of constructing the MVG plant at West Memphis was to satisfy TVA's need for additional capacity in that area in replacement of capacity furnished by TVA [fol. 450] to AEC at Paducah, the arrangements contemplated by the Power Contract do not fall in the category of either displacement or wheeling.

The term "replacement" is not a commonly accepted term in the power industry. As previously stated, the term was coined by the AEC in connection with the project involved here. The arrangement contemplated by the Power Contract was an exchange of both capacity and energy at the MVG plant in West Memphis for capacity and energy which the TVA was obligated to supply to the AEC at its Paducah installation.

IV. The Waiver Defense[3]

165. Section 164 of the Atomic Energy Act of 1954 (68 Stat. 951) provides in part:

> Any contract hereafter entered into by the Commission pursuant to this section shall be submitted to the Joint Committee and a period of 30 days shall elapse while Congress is in session (in computing such 30 days, there shall be excluded the days on which either House is not in session because of adjournment for more than three days) before the contract of the Commission shall become effective: Provided, however, That the Joint Committee, after having received the proposed contract, may by resolution in writing, waive the conditions of or all or any portion of such 30-day period.

166. The United States House of Representatives, 2d Session, of the 83d Congress, adjourned on August 20, 1954, and did not thereafter reconvene.

The United States Senate of the 83d Congress, 2d Session, adjourned on August 20, 1954, and did not reconvene until November 8, 1954, and thereafter met on Novem-

---

[3] Paragraph 24(C) of defendant's answer.

ber 9, 10, 11, 15, 16, 17, 18, 29, 30, and December 1 and 2, 1954, on which last date it adjourned *sine die*.

167. On August 18, 1954, Nichols sent the Chairman of the Joint Committee on Atomic Energy a copy of the sixth proof of the contract dated August 11, 1954, with a letter stating that it would be necessary to begin construction of the power plant at an early date to insure the availability of the power by the fall of 1957. Therefore, Nichols recommended that the Joint Committee consider waiving the [fol. 451] 30-day requirement specified in Section 164 of the Atomic Energy Act of 1954.

On the same day Hughes wrote the Chairman of the Joint Committee a letter to the same effect, expressing the hope that the committee would waive the 30-day requirement of the act.

168. On October 6, 1954, the Acting Chairman of the AEC wrote the Chairman of the Joint Committee regarding the October 1 proof of the proposed contract. The AEC Chairman reported that before the draft was approved, AEC had favorable letters from the Federal Power Commission, the General Accounting Office, TVA, the Bureau of the Budget, the Chief of Engineers, and an opinion from the General Counsel of AEC. The writer mentioned the discussions between AEC and TVA, declared that the only question remaining open was the distribution of costs between TVA and AEC, and expressed the opinion that, since the question of the distribution of costs did not involve the terms of the contract between AEC and MVG, the AEC did not believe that it should delay consideration of the contract by the Joint Committee. He concluded the letter with the recommendation that the Joint Committee consider a waiver of the 30-day requirement in Section 164 of the Atomic Energy Act of 1954 in order that the power would be available by the fall of 1957 and to permit MVG to take advantage of the remainder of the construction season prior to high water in the Mississippi River.

169. Hearings before the Joint Committee, 83d Congress, 2d Session, were conducted on November 4, 5, 6, 8, 9, 10, 11, 12 and 13, 1954, on the "Exercise of Statutory Requirements Under Section 164, Atomic Energy Act of 1954." The hearings were printed in a volume (plaintiff's exhibit 148) containing 1,020 pages.

170. On November 11, 1954, the AEC sent the Joint Committee an executed copy of the Power Contract and its supplements, the interpretative memorandum, the letter contract between the sponsors and AEC, a copy of the opinion of the General Counsel of AEC, and two letters from MVG regarding the execution and delivery of the Power Contract.

171. On November 13, 1954, the Joint Committee on Atomic Energy of the 83d Congress adopted, by a vote of [fol. 452] 10 to 8, a resolution (defendant's exhibit 125), waiving the conditions of the 30-day period specified in section 164 of the act. The resolution referred to the provisions of Section 164 of the Atomic Energy Act of 1954, the powers and duties of the Joint Committee thereunder, the submission to the Joint Committee by AEC of the contract and other documents described above, the AEC's request that the conditions of the 30-day period of the act be waived, and the fact that the committee had held extended hearings, pursuant to which many changes that would adequately protect the interests of the United States had been made in the contract.

172. On January 28, 1955, the Joint Committee on Atomic Energy of the 84th Congress, 1st Session, by a vote of 10 to 8, adopted a resolution rescinding the resolution of waiver adopted November 13, 1954. The rescinding resolution referred to the provisions of Section 164 of the Atomic Energy Act and to the powers and duties of the Joint Committee, and stated as follows:

* * * * * * *

> Whereas, the Joint Committee by Resolution on November 13, 1954, adopted a resolution purporting to waive "the conditions of and all of the thirty-day period specified in Section 164," while Congress was not in session, and
>
> Whereas, the Atomic Energy Commission presented no substantial or compelling reasons to justify the adoption of a waiver resolution while Congress was not in session, and
>
> Whereas, the effective date of said contract by its own terms has not yet occurred, and
>
> Whereas, the hearings of the Committee on this and related questions were incomplete and inadequate, and

Whereas, the action of the then majority of the Joint Committee, in adopting a waiver resolution tended to deprive the 84th Congress of its full opportunity of review and freedom of action with respect to the aforesaid contract.

Now Therefore, Be It Resolved: (1) that the Joint Committee on Atomic Energy do hereby rescind the resolution of waiver, and

(2) that it is the sense of the Joint Committee on Atomic Energy that the said contract is not in the public interest and the Committee recommends that the [fol. 453] Atomic Energy Commission take appropriate steps to cancel the so-called Dixon-Yates contract.

173. (a) On January 18, 1955, during the proceedings on MVG's equity financing before SEC, the Division of Corporate Regulation of SEC filed a brief (plaintiff's exhibit 21-I), stating that the waiver resolution was valid, although adopted while Congress was not in session.

(b) In the same proceedings before SEC, the AEC filed a brief with respect to the waiver resolution, the brief stating in part:

> We need not repeat the demonstration, made in the reply briefs for the Division of Corporate Regulation and the Proponents, that Section 164 authorizes a waiver while Congress is not in session. Indeed the fact that Section 164 uses the phrase "while Congress is in session" only in conection with the requirement that a period of thirty days elapse, and contains no requirement that Congress be in session either when the contract is filed or when a waiver resolution is adopted, is indicative of careful draftsmanship, designed to carry out the intent, which was clearly stated by Senators Ervin, Ferguson, Hickenlooper, Hill, Holland and Gore and disputed by no one during the debates on the Atomic Energy Act of 1954, that the Committee could adopt a waiver resolution when Congress was not in session.
>
> * * * * * * *
>
> *Section 164 does not empower the Joint Committee to revoke or rescind a waiver resolution once the contract has become effective.*

The Joint Committee's resolution of January 28, 1955 appears to assume that a resolution of waiver is subject, for an indefinite time, to a right of reconsideration by the Committee. No such right of reconsideration is conferred by Section 164. To imply it would defeat the purpose of the provision for waiver by the Joint Committee. The evident purpose of that provision was to avoid the delays that might result if a contract could not become effective until thirty days had elapsed while the Congress was in session.

(c) After the SEC's order approving MVG's equity financing was issued, the order was appealed to the United States Court of Appeals for the District of Columbia on March 14, 1955. The brief (plaintiff's exhibit 28) which [fol. 454] the United States as *amicus curiae* filed with the Court of Appeals contained the following statements regarding the waiver resolution and the rescinding resolution:

> We are not certain whether petitioners intend, by point 5, to renew the argument made before the SEC that Section 164 did not authorize such a waiver while Congress was not in session. It is evident from the terms and legislative history of the section that it did. In terms, it authorizes not only waiver of part or all of the thirty-day period, but also of "the conditions of" such period. One of those conditions, whose waiver is authorized, is the condition that the thirty-day period be a period while Congress is in session. Indeed, if the provision for waiver of the conditions of the thirty-day period is not read as referring to the condition that Congress be in session, it would serve no useful purpose.

* * * * * * *

The contract having become effective, the Joint Committee's Resolution of January 28, 1955, did not operate to render it ineffective. It is clear that Congress, in Section 164, did not reserve to the Joint Committee authority to rescind a prior waiver resolution so as to invalidate an effective contract. To have done so would have defeated the objective of the waiver provision to permit the procedure to be "expedited" in appropriate

cases, for if the waiver were subject to rescis-ion the parties could not safely proceed with their contract until after 30 days had expired while Congress was in session. Reservation in the Joint Committee of a right to invalidate an effective contract would also have raised constitutional problems, which the Senate debates show Congress was careful to avoid.

* * * * * * *

Even if it could be assumed, however, that the waiver action of November 13 either was ineffective or was validly rescinded, the requirements of Section 164 have nevertheless been fully complied with.

Section 164 requires merely that the contract be filed with the Joint Committee and that a period of 30 days elapse while Congress is in session. The contract had been filed, its terms made public, and the surrounding circumstances fully explored by the exhaustive hearings held last November. By February 4, 1955 there had elapsed 30 days during which Congress had been in session and had had opportunity to take whatever action with respect to the contract it might deem appro- [fol. 455] priate. Nothing in Section 164 imposes a requirement that the filing and the period of thirty days occur at the same Congress or session.

* * * * * * *

We find no requirement in the text of Section 164 that the contract be such that it would become effective immediately upon the adoption of a waiver resolution; the section provides only that the contract cannot become effective until the requirements of Section 164 are met. Moreover, as we have pointed out previously, the contract did become effective on Dec. 17, 1954, prior to the reconvening of Congress.

The minority's position that the contract had not become effective rests on a misconstruction of the contract which would lead to an untenable result. Section 8.22, which defines the effective date of the contract * * *, does not require the receipt of necessary regulatory approvals as a condition to effectiveness.

And while Section 8.15 makes the obligations of the parties subject to the receipt of such approvals, this clearly establishes a condition subsequent and does not prevent the contract from being effective on the date specified in Section 8.22.

(d) On July 11, 1955, the date on which plaintiff was advised by AEC that the President had decided to order termination of the Power Contract, the General Counsel of AEC submitted to the Atomic Energy Commission a memorandum of his views as to the effectiveness and enforceability of the contract. With respect to the resolutions of waiver and rescission, the memorandum stated:

> On January 28, 1955, the Joint Committee on Atomic Energy adopted a resolution which purported to rescind the Joint Committee's waiver resolution of November 13, 1954 and which declared it to be the sense of the Joint Committee that the contract is not in the public interest and recommended that AEC take appropriate steps to cancel the contract. Section 164 in my view does not authorize the Joint Committee to rescind or revoke a waiver resolution after the contract has become effective. The express purpose of the waiver proviso was to permit expeditious action in appropriate cases when Congress was not in session. This purpose would be defeated if a waiver could be rescinded after the contract became effective. The permit rescission of a waiver [fol. 456] resolution would nullify the intent of Congress in enacting the waiver proviso.
>
> Even if we were to as ume that the Joint Committee did have authority to revoke its prior resolution, it would be my opinion that the requirements of Section 164 have been satisfied on February 4, 1955, by the expiration of a 30-day period during which Congress had been in session.
>
> Accordingly, I conclude that the MVGC contract was executed and became effective pursuant to legal authority and constitutes a valid obligation of the Government.

(e) In a written opinion submitted by the Assistant Comptroller General to the Chairman of AEC on July 29, 1955, the following appeared:

> In our view the conditions of section 164 were satisfied regardless of the effect of the resolution of rescission.
>
> * * * * * * *
>
> We do not believe section 164 requires that contracts submitted to the Joint Committee thereunder be immediately effective upon the granting of a waiver or the lapse of the thirty-day waiting period. The purpose of the requirement in section 164 for a waiting period or a waiver was to afford the Congress an opportunity to review the power to make such contracts and to take appropriate legislative action if it so desired. The thirty-day period is a minimum period during which the Congress may legislate; any additional postponement of the effective date of a contract would afford even greater opportunity for legislative action. Consequently, it is our view that section 164 fixes a time before, which a proposed contract cannot become effective, rather than a time after which the contract must be effective. In other words, the section does not require the submission to the Committee of a contract which is immediately effective in all respects upon the expiration of the waiting period or the granting of a waiver. The contract has been on file with the Joint Committee from November 11, 1954, to the present time. Thus, even if the waiver action of November 13, 1954, should be considered invalid, the prescribed waiting period of thirty days expired on February 4, 1955, Congress having been in session since January 5, 1955.

[fol. 457] V. THE PUBLIC UTILITY HOLDING COMPANY ACT DEFENSE[4]

174. Section 12 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79 (L), (a provides:

> It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to borrow, or to receive any extension of credit or indemnity, from any public utility company in the same holding-company system or from any subsidiary company of such holding company * * *.

This statute has been implemented by a regulation of the Securities and Exchange Commission which provides as follows:

> *Loans, extensions of credit, donations and capital contributions to associate companies*—(a) General provision.—No registered holding company or subsidiary company shall, directly or indirectly, lend or in any manner extend its credit to nor indemnify, nor make any donation or capital contribution to, any company in the same holding-company system, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in Section 250.23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act. (17 C. F. R. Section 250.45 (a), 1949 ed.)

175. During the latter part of May 1954, representatives of First Boston and Lehman Brothers submitted to the Metropolitan Life Insurance Company a proposal dated May 18, 1954, relating to MVG's debt financing. It provided in part as follows:

> The contract between the new company and the AEC will be supplemented by contracts between the new company and companies within the systems of the sponsoring companies under which such system companies will

---

[4] Paragraph 24(D) of defendant's answer.

assume several obligations to take or pay for, in the aggregate, sufficient power and energy to service the debt securities to the extent that income from the AEC or others may not be sufficient so to do.

Among the documents attached to the proposal was a suggested text of the major terms and conditions of MVG's [fol. 458] first mortgage bonds. Paragraph 7 of the text, which was entitled "Security", provided that the first mortgage bonds would be secured by an indenture of mortgage and a deed of trust, constituting a first lien upon all of the plants and real property of MVG and also upon MVG's interests and rights in the AEC contract and in the agreements of the companies within the two sponsoring systems with respect to the purchase of power and energy to the extent such power and energy was not used by AEC.

On August 11, 1954, Metropolitan's committee on finance and investment authorized the purchase of up to 78 million dollars of MVG first mortgage bonds. The memorandum of authorization stated that, in the event the Power Contract was terminated, the operating subsidiary companies of the two parent companies would be obligated to purchase the power and make payments sufficient to service the debt to Metropolitan.

176. On August 10, 1954, the sponsors entered into a memorandum of understanding relating to the proposal of April 10, 1954, and to MVG, the new company which was to be organized to construct the power plant under contract with AEC. Paragraph D (I) thereof provided:

(a) The project facilities to be owned by MVG ("the Facilities") are to be designed to have a net capability of approximately 650,000 kw., of which the excess over Contract Capacity (which will be 600,000 kw. subject to certain adjustments) required to be delivered to AEC under the proposal is reserve capacity. Since such excess is not adequate to provide the equivalent of one generating unit of the Facilities, it will be necessary for MSU and Southern, or their respective subsidiaries, to undertake to furnish MVG for delivery to AEC, without additional charge to AEC, power and energy in an amount sufficient, with one generating unit out of service, to deliver Contract Capacity at the so-called Pri-

mary and Secondary Delivery Points referred to in the proposal. Such amount is hereafter referred to as "back-up supply."

(b) AEC may in certain circumstances reduce below Contract Capacity its obligation to take and pay for power.

(c) From time to time power and energy may be available out of the facilities in excess of that required for delivery to AEC. Such excesses as may be so avail- [fol. 459] able, whether or not the AEC has reduced its obligation, are hereafter referred to as "surplus supply."

Paragraph D (II) stated that the sponsors or their subsidiaries would enter into agreements with MVG regarding the surplus supply of power generated by MVG. This paragraph further provided:

(b) The system of each party hereto shall be obligated to pay its participation ratio of all the cost and expenses (other than expenses paid through energy charges) of MVG to the extent, if any, that such cost and expenses may not be paid or reimbursed out of payments received from the AEC and others. Such costs and expenses shall include debt service charges.

The last paragraph provided that the memorandum was intended as a general working agreement for the project and that it was executed with the knowledge that as the project progressed, many matters which were not provided for in the memorandum, as well as matters which were covered therein, would have to be treated in some other manner than as specified in the memorandum.

177. On October 29, 1954, shortly before the execution of the Power Contract, Daniel James, an attorney for plaintiff, wrote AEC in response to a request for information regarding the provisions of the contract with respect to contemplated arrangements with the systems of the sponsors. After referring to sections 2.02 and 8.16 of the proposed contract, as well as the memorandum of understanding of August 10, 1954, James' letter stated:

* * * * * * *

The working out of the actual inter-company power agreement is largely a matter of detail. That agreement, in the nature of things, ~~cannot be too rigid and~~ will not necessarily be preserved in exact detail from year to year. It will have to be flexible enough so that amendments may be made to conform with the changing operating and other conditions which may arise over a 25-year period. The limitation is clear, however, that this inter-company power agreement, implementing the overriding obligations of the Company to the AEC and of the Sponsoring Companies to the Company, will not and cannot be modified in any way to impair those overriding obligations. The important consideration from the standpoint of the AEC is that the overriding [fol. 460] obligations themselves are clearly set forth in the power contract itself and are implemented by the memorandum of understanding. These are summarized above.

The various power and financing arrangements must be carried out in their natural and normal order. The working out of the power contract establishes certain overriding obligations of the Company to the AEC with respect to securing contractual arrangements for back-up supply and for the sale of surplus power; the power contract has to be finalized before the financing can be finalized; the finalizing of the financing arrangements will establish certain additional overriding obligations respecting purchasing power and payments for it by the systems of the Sponsoring Companies; and then the contractual arrangements among the Companies can be worked out to implement—but not change—the overriding obligations.

* * * * * * *

178. The recitals of the Power Contract read in part as follows:

Whereas, the Proposal contemplates, that, of the approximately 650,000 kilowatts of net capability of the new plant, approximately 50,000 kilowatts will be available toward providing the required reserve to supply service hereunder, and inasmuch as such 50,000

kilowatts is not adequate for such purpose when one generating unit is out of service, the Company is making arrangements with the Systems of the Sponsoring Companies so that, in return for the Company's making available to such systems such 50,000 kilowatts of capacity when no units are out of service, such systems will make available to the Company as additional reserve for the Company's obligation to the AEC, at no additional cost to the AEC, up to approximately 200,000 kilowatts of additional back-up capacity when a unit or units of the Facilities are caused to be shut down; and

* * * * * * *

Whereas, among the considerations which induced the Sponsoring companies to make the Proposal and to cause the same to be carried out is the reservation to the Company of the right to make use of the Facilities hereinafter described for purposes other than the supply of capacity and energy to or for the AEC at such times and to such extent as such service to or for the AEC does not prevent such other use;

[fol. 461] Section 2.02 of the Power Contract reads as follows:

Section 2.02. *Interconnections with Sponsoring Companies:* The Company will establish or cause to be established interconnections between the Facilities and the systems of the Sponsoring Companies, directly or indirectly, by means of which there will be afforded additional security of service under this contract from such systems, and an outlet for power and energy produced at the Facilities and from time to time not needed for deliveries to or for the AEC hereunder. The company represents that it is entering into a contract or contracts with the Sponsoring Companies or subsidiaries thereof to provide power to the Company over such interconnections for a period of 25 years after the beginning of initial commercial operation for the purposes of (a) enabling the Company to deliver hereunder the full Preliminary Contract Capacity or the full

Contract Capacity, as the case may be, even though one generating unit of the Facilities may be out of service, and (b) making available from the Facilities to subsidiaries of the Sponsoring Companies or others power which from time to time is not needed by the Company to furnish the power to which the AEC is entitled hereunder. Energy taken by systems of the Sponsoring Companies will be charged to such systems at not less than the incremental cost thereof.

In the interpretative memorandum executed by plaintiff and AEC simultaneously with the execution of the contract, the following provision appears:

Section 2.02 The Company is to furnish AEC with copies of all agreements contemplated by Section 2.02 and paragraph 1 of Section 8.16 and with copies of any amendments or modifications to any such agreements. The Company is also to furnish AEC with copies of all contracts and commitments and amendments or modifications thereto, entered into between the Company and the institutional investors and banks, or representatives thereof, in connection with the financing of the Compay's capital investment, including any bond indenture, mortgage or other evidence of indebtedness issued in connection therewith.

The term "incremental cost" which appears at the end of this Section means: "All of the costs and expenses associated with and experienced by the actual production and delivery of the product, electrical energy, over and above all of the costs and expenses which would have been incurred had there been no such ac- [fol. 462] tual production and delivery." This definition is also applicable to the use of the term "incremental cost" in the last sentence of paragraph 1 of Section 4.08. The parties will from time to time agree upon procedures for determining incremental cost.

In the event the Power Contract was terminated by AEC section 7.03 of the contract obligated plaintiff to absorb not less than 100,000 kw. of contract capacity on the date of termination and 100,000 kw. of capacity on each succeeding

anniversary of the date of termination until the entire contract capacity was absorbed.

179. Contemporaneously with the execution of the Power Contract, Letter Contract No. AT-(49-1)-815, dated November 11, 1954, was entered into between the sponsors and AEC and provided (1) that in the event power was not delivered under the Power Contract by MVG to AEC at the time fixed for initial deliveries; or (2) in the event of termination of the contract for any cause; or (3) the inability of MVG to deliver 400,000 kw.

> * * * the Sponsoring Companies, or subsidiaries thereof, will be obligated to supply, severally and separately and in the proportions of 80 per cent for the Middle South system and 20 per cent for the Southern Company system, and the Commission will be obligated to pay for, 100,000 kilowatts of firm capacity (hereinafter called "Interim Power").

Paragraph 3 of the letter contract provided:

> In either event described in Paragraph 1 above, the Commission and the Sponsoring Companies, or subsidiaries thereof, will enter into a formal contract for the supply of Interim Power (hereinafter referred to as the "Inferim Power Contract"). Such contract will include, in addition to the provisions described in Paragraphs 1 and 2 above, the following terms and conditions * * *.

180. Plaintiff's debt financing was to be obtained through bonds purchased by the Metropolitan Life Insurance Company and New York Life Insuran e Company and by loans made by The Chase Manhattan Bank and other banks which agreed to take plaintiff's notes. It was a complicated financial transaction and the discussions between the lending institutions and plaintiff's representatives regarding the de- [fol. 463] tails thereof extended from the latter part of May 1954, to sometime in April 1955.

On January 14, 1955, as a result of suggestions made by the insurance companies, plaintiff's attorneys prepared and distributed a new proof of the proposed bond purchase agreement. At the same time, plaintiff's attorneys prepared

and distributed to First Boston, Lehman Brothers, the sponsors, and various subsidiaries of the sponsors a memorandum outlining the principal changes that had been made in the bond purchase agreement and the intercompany agreement. The following appears in the memorandum:

Intercompany Agreement

This Agreement in effect provides for the sale of surplus power of MVG, not taken by the AEC to the Participating Companies and provides for an overriding obligation of the Participating Companies to pay enough to service the debt of MVG to the extent that the AEC's payments do not do so. The capacity charge under the AEC Power Contract is designed to pay all the debt service charges of MVG, but the creditors look to the Intercompany Agreement as security for the payment of their bonds and notes in the event that the AEC contract is cancelled or in the event that the Power Contract should not produce the desired results.

The scope of the obligations to be undertaken by the Participating Companies is one in which the creditors have evinced the greatest interest. The draft Intercompany Agreement which was attached as Exhibit A to the proof of August 25 of the Bond Purchase Agreement as prepared by us provide in effect that the Participating Companies would take and pay for power and energy in specified proportions so that, in the event that no power and energy was available for sale to them there would be no obligation to make any payments, whether or not MVG had enough money for debt service purposes. The insurance companies have stated that this type of provision, which was used in the EEI case, was unsatisfactory to them: they want provisions like those obtained in the OVEC situation. The draft Intercompany Agreement which is attached to the new proof of the Bond Purchase Agreement is intended to indicate the type of provisions the insurance companies would like. The principal substantive differences are contained in paragraphs 1 and 2 (c) of the Intercom-[fol. 464] pany Agreement. Under the new proof the Participating Companies would be paying not for power and energy but for the right to receive power and

energy and there would be a force majeure clause, substantially the same as that included in the AEC contract. As a result the Participating Companies would be obligated to pay for the right to receive power and energy whether or not they obtained any power and energy and would also be obligated to pay for the right even if due to force majeure, such as an explosion, strike, etc., MVG was in no position to deliver any power and energy to them. It is of course expected that 50,000 kilowatts will be available for sale to the Participating Companies most of the time so that if things work out as expected there would be little difference between our suggestions and those of the insurance companies. The insurance companies point out, however, that their provisions would result in liability for payment by the Participating Companies in the following situations (among others) where no liability would exist under our original draft:

(a) if the AEC Power Contract is cancelled and force majeure occurs which makes it impossible for MVG to deliver power to the Participating Companies;

(b) if the AEC Power Contract remains in effect, but does not produce sufficient revenues to service MVK's debt, and MVG due to force majeure is unable to furnish power and energy to the Participating Companies;

(c) if at a time before the plant is complete, when no revenues are being received from the AEC, MVG has no funds available to service debt.

We have emphasized in discussions with counsel for the insurance companies that, whatever provisions we agree to, the Participating Companies would under no circumstances undertake obligations which amounted to a guarantee of MVG's debt. The obligations reflected in the revised proof come closer to a guarantee than do the obligations originally suggested by us in the August 25 proof. It should be noted, however, that they are not dissimilar from the OVEC obligations which counsel in that case were satisfied were not guarantees. It should also be noted that the amounts to be paid by the Participating Companies will be designed to cover amortization and interest and not the

principal of the Bonds and Notes due otherwise than pursuant to regular amortization schedules. The insurance companies have suggested that the amounts [fol. 465] paid by the Participating Companies also cover other mandatory redemptions, but this suggestion appears unacceptable.

In the light of the revisions which have been made in paragraphs 1 and 2 (c) of the Intercompany Agreement, revisions of the Whereas clauses have been made in order to emphasize the business advantages to the Participating Companies of the Intercompany Agreement and thereby minimize the possibility of their obligations being construed as guarantees. Changes have been made in paragraph 6 for the same reason. A specific provision has also been inserted in paragraph 7 to the effect that the obligations of the Participating Companies will terminate in the event of recapture. This was not a necessary provision under our original language, but becomes necessary if the insurance companies' suggestions are to be followed.

With respect to section 6.04 of the proposed bond purchase agreement, the memorandum further stated:

> § 6.04. This Section, as a condition to the obligation of the insurance companies, requires that the important MVG contracts continue in full force and effect. The condition is in substance carried forward to each closing. The insurance companies have requested that one of the agreements which must be in full force and effect is the agreement (the "Supplemental and Surplus Power Agreement") between MVG, Middle South Utilities, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, as to the purchase of supplemental power and the sale of surplus power, as represented in § 2.02 of the Power Contract. In view of the representation contained in the Power Contract, there can probably be no objection to following this suggestion. There would, however, seem to be no necessity for a legal opinion on this agreement unless the AEC asks for it.
>
> The insurance companies also want a condition that the AEC-TVA arrangements as to the delivery of power

be in full force and effect. We are trying to find out what the status of these arrangements is. Initially it does not seem appropriate to make the obligations of a private company depend on arrangements between two Government agencies which we contend do not affect MVG's rights under the Power Contract. The insurance companies also want opinions from private counsel as to the validity of the AEC-TVA arrangements. It would again seem inappropriate to have private counsel [fol. 466] pass on the validity of arrangements between two Government agencies.

181. A conference between the banks and plaintiff's representatives with respect to the bank credit agreement was held on February 9, 1955, and the agreements of the parties were set forth in a memorandum of the same date. There were three conferences between the insurance companies and plaintiff's representatives in January and February 1955 with respect to the bond purchase agreement. As a result, a memorandum of agreement was prepared. It was dated February 17, 1955, and provided in part as follows:

1. The Intercompany Agreement will be signed by Middle South and Southern, and not by the subsidiaries of either System.

2. In the Intercompany Agreement, Middle South and Southern in consideration of the right to receive power and energy, whether or not available, will agree to pay or cause to be paid an aggregate amount sufficient to provide revenue which, when added to revenue derived by MVG from AEC and any other sources, will be sufficient to enable MVG to pay, when due, all of its operating and other expenses and all of its taxes and to pay, when due, interest on and regular required amortization of the bonds and the notes.

3. The obligations of Middle South and Southern shall be several, separate and distinct, and in the amounts of 80% for Middle South and 20% for Southern. In cases where power and energy are purchased from MVG by any operating company of either System, assurance of payment for such power and energy shall

be the responsibility of such operating company's parent company only.

4. In the Intercompany Agreement, Middle South and Southern will agree to pay or cause to be paid to MVG an aggregate amount sufficient to enable MVG to pay its expenses and taxes and service its debt (as per paragraph 2 above) in the event that MVG is unable otherwise to pay such expenses, taxes and debt service because of failure on the part of AEC or others to pay on schedule amounts due MVG for power and for energy, with the provision that any such payments by Middle South and Southern for this reason shall be repaid to Middle South and Southern by MVG after the amounts due from AEC or others have been collected by MVG.

[fol. 467] 5. The Intercompany Agreement *may* include a force majeure clause containing a requirement that non-delivery or non-avaliability of power or energy on account of force majeure shall not relieve Middle South and Southern from their respective obligations to pay MVG amounts necessary pursuant to paragraph 2 above.

* * * * * * *

7. There shall be executed as a condition precedent to the first bank closing a "supplemental and surplus power agreement" between MVG and the Arkansas, Louisiana and Mississippi companies of the Middle South System and the four Southern System companies, to which the seven subsidiaries shall be signatories, directly or indirectly, providing for the purchase by such subsidiaries from MVG of surplus power and energy, and the supplying to MVG of back-up power and energy. This agreement will ot be pledged under the MVG mortgage.

The bank credit agreement, the bond purchase agreement, the intercompany agreement, and the back-up and surplus power agreement were thereafter prepared in final form, in substantial conformity with these agreements.

182. The bank loan agreement was executed on April 21, 1955, and article 1 thereof contained the following definitions:

> a. *Back-up and Surplus Power Agreement:* The term "Back-up and Surplus Power Agreement" shall mean the agreement or agreements referred to in section 2.02 of the Power Contract.
>
> * * * * * * *
>
> j. *Intercompany Agreement:* The term "Intercompany Agreement" shall mean the agreement among the Company, the Sponsoring Companies, the Trustee under the Mortgage and The Chase Manhattan Bank as representative of the Banks, substantially in the form attached hereto and marked Exhibit A.
>
> * * * * * * *
>
> n. *Power Contract:* The term "Power Contract" shall mean, collectively, (i) the agreement dated November 11, 1954, No. AT(49-1)-814 between the Company and The United States of America, acting by and through the Atomic Energy Commission, as modified by Supplement No. 1 dated November 11, 1954, to said agreement No. AT-(49-1)-814, and (ii) the interpretive memorandum, dated November 11, 1954, with respect [fol. 468] to said agreement No. AT-(49-1)-814 with attached letter agreement of the same date between the Company and the Atomic Energy Commission, copies of all of which have been delivered to the Banks.

Article 6 is entitled "Conditions to Obligations of Banks at First Borrowing." Section 6.01 states that the obligations of each bank at the first borrowing shall be subject to the satisfaction of the conditions set forth in this article. Section 6.08, entitled "Contracts", provides:

> The Power Contract, the Intercompany Agreement, the Bond Purchase Agreements, the Engineering Agreement, and the Back-up and Surplus Power Agreement, shall have been duly entered into by the respective parties thereto.

The section further provides that except as the Power Contract may have been terminated or cancelled pursuant to the provisions thereof, or as the back-up and surplus power agreement may have been modified pursuant to its terms, "each of said agreements shall be in full force and effect and shall not have been terminated or modified otherwise than as permitted by the provisions thereof."

Article 7 is entitled "Conditions to Obligations of Banks at Secondary Borrowings." Section 7.01 provides that the obligations of the banks at any secondary borrowing shall be subject to the satisfaction, as of the secondary borrowing date, of the conditions set forth in section 6.08, among others. . . .

183. The bond purchase agreements with the two insurance companies, also dated April 21, 1955, contained the same definitions of "back-up and surplus power agreement," "intercompany agreement" and "power contract," as the bank credit agreement.

Article 6 of the bond purchase agreement was entitled "Conditions To First Borrowing Under Bank Credit Agreement." Section 6.04 entitled "Contracts," required that the Power Contract, the intercompany agreement, the engineering agreement and the back-up and surplus power agreement shall have been duly entered into by the respective parties thereto. Section 7A.01 and 7B.01 required compliance with section 6.04 on each closing for bonds under the agreement.

[fol. 469] The proposed mortgage and deed of trust securing the bonds, a copy of which was attached to the bond purchase agreement, provided that there should be pledged under said mortgage, among other things, all of plaintiff's right, title and interest under the Power Contract and the intercompany agreement. In section 5.26 of the mortgage, plaintiff was to covenant that:

> There will at all times be in effect an agreement between the Company and one or more subsidiaries of each Sponsoring Company making available to the systems of the Sponsoring Companies power and energy which from time to time is not needed by the Company to meet its obligations under the Power Contract, and containing provisions with respect to the payment for

such power and energy, all as contemplated by paragraph 4 of the Intercompany Agreement. So long as the Power Contract remains in effect, there will also at all times be in effect an agreement between the Company and one or more subsidiaries of each Sponsoring Company complying with the provisions of clause (a) of the second sentence of Section 2.02 of the Power Contract.

184. The intercompany agreement, although not executed, had been prepared in final form and was attached as an exhibit to the bond purchase agreement. This was to be an agreement to be signed by plaintiff, the sponsors, the trustees under the mortgage securing the bonds, and a representative of the banks which had signed the bank credit agreement.

The recitals to the intercompany agreement read in part as follows:

Whereas, it is anticipated that MVG will have available for sale to others, as provided in the Power Contract or after the expiration or earlier termination thereof, power and energy from its generating station to the extent not required to meet its obligations to the Atomic Energy Commission under the Power Contract; and

Whereas, MVG desires to sell such power and energy to the systems of the Sponsoring Companies and they desire to be entitled to purchase the same, upon the terms and conditions herein set forth;

[fol. 470] After reciting the obligations of the insurance companies to purchase bonds, and of the banks to make loans, the recitals continued:

Whereas, the inducements to said insurance companies and said banks in agreeing to make said loans include the agreements of the Sponsoring Companies herein contained, including the agreements to pay for the right to purchase power and energy from MVG and to supply equity capital to MVG, all as herein provided; and

Paragraph 1 of the agreement provided as follows:

1. (a) MVG will make available or cause to be made available to the systems of the Sponsoring Companies all such power and energy as MVG may have available after fulfilling its obligations, if any, under the Power Contract. Such power and energy is herein referred to as power and energy.

(b) the systems of the Sponsoring Companies will be entitled, in the respective percentages set forth in paragraph 3 (b) hereof, to purchase power and energy and, subject to the provisions of paragraph 3 hereof, the Sponsoring Companies will pay or cause to be paid, in such respective percentages, for the right hereby granted to purchase power and energy, whether or not MVG shall have any power or energy available, an aggregate amount sufficient to provide revenue which, when added to all other revenues, if any, of MVG, including amounts received upon sales to the Atomic Energy Commission and amounts received upon sales to companies in the systems of the Sponsoring Companies, will be sufficient to enable MVG to pay when due all its operating and other expenses and all its taxes, to pay when due interest and regular required amortization on all bonds outstanding under the Mortgage from time to time (herein called the "Bonds") as provided in the Mortgage, and to pay when due interest and Mandatory Regular Prepayments (under § 4.01 (A) of the Bank Credit Agreement) on the Notes as provided in the Bank Credit Agreement. The term "regular required amortization" shall not include payments on account of principal at rates greater than those initially set forth in the sinking fund or amortization schedules for the Bonds; and the term "operating and other expenses" shall not include any payments on the principal of indebtedness, whether at stated or accelerated maturity.

[fol. 471] (c) If any company in the system of a Sponsoring Company shall default in making payment to MVG under any contract or other arrangement providing for payments by such company for power and energy which such system is entitled to purchase under

paragraph 1 (b) hereof, or for the right to purchase power and energy, such Sponsoring Company will promptly make such payment or cause the same to be made. Any amount for which MVG shall have a valid claim against a Sponsoring Company under this paragraph 1 (c) shall be deemed to constitute an amount received upon sales to companies in the systems of the Sponsoring Companies, within the meaning of paragraph 1 (b) hereof, for the purpose, but only for the purpose, of determining the amounts, if any, due from the other Sponsoring Company. Except to the extent stated in the foregoing sentence, nothing in this paragraph 1 (c) shall be deemed to affect the obligation of the Sponsoring Companies, or other of them, under paragraph 1 (b) hereof.

Paragraph 3 (e) and paragraph 4 of the agreement provided as follows:

(e) MVG shall not be held responsible or liable for any loss or damage to the system of either Sponsoring Company on account of non-delivery or non-availability of power and energy hereunder at any time caused by Act of God, fire, flood, explosion, strike, civil or military authority, insurrection or riot, act of the elements, failure of equipment, utilization of the entire net available capacity of MVG in compliance with the Power Contract as in effect from time to time, or for any other cause beyond its control; and non-delivery or non-availability on account of any such causes shall not relieve the Sponsoring Companies from their respective obligations under the provisions of paragraph 1 hereof.

4. Subject to the provisions hereof, each Sponsoring Company or one or more of its subsidiaries will enter into an agreement or agreements from time to time with MVG or with MVG and the other Sponsoring Company or one or more subsidiaries of either Sponsoring Company, containing provisions, among others, relating to the purchase of and payment for power and energy. The Sponsoring Companies and their subsidiaries may provide in such agreement or agreements for deliveries of power and energy and payments therefor, as among themselves, other than in the percentages specified in

paragraph 3 (b); but no such agreement shall be in derogation of this agreement or relieve either Sponsoring Company from its obligations hereunder, which ob- [fol. 472] ligations shall continue for the purposes hereof as if such other agreement or agreements provided for deliveries of power and energy and payments therefor on the basis of the percentages set forth in paragraph 3 (b) hereof. Each subsidiary of a Sponsoring Company shall make payments directly to MVG for all power and energy delivered to or for the account of such subsidiary (less any applicable credits for losses or for back-up or other power and energy delivered by such subsidiary to or for the account of MVG), and each such other agreement shall so provide. Copies of any such agreements, including amendments and supplements thereto, will be filed by MVG with the Trustee and with the Representative within five days after they became effective.

185. The back-up and surplus power agreement had not been executed, but was in substantially final form, and its execution had been authorized by the boards of directors of the subsidiaries who were to be signatories. This agreement was to be executed between plaintiff and the following subsidiaries of the sponsors: Mississippi Power & Light Company, Arkansas Power & Light Company, Louisiana Power & Light Company, Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, and was to continue until January 1, 1989, or the retirement of plaintiff's power plant from service, whichever should be later, unless sooner terminated by mutual agreement of the parties.

Section 0.2 defines the following terms as used in the agreement:

Back-up shall mean power and energy furnished to or for Mississippi Valley from time to time in order to enable it to continue service to the AEC as provided in Section 2.02 (a) and the first sentence of Section 3.01 of the Power Contract.

Power Contract shall mean the contract dated November 11, 1954, by and between Mississippi Valley and the United States of America, acting by and through the AEC—Contract No. AT-(49-1)-814. Supplement No. 1 thereto dated November 11, 1954, and the Interpretative Memorandum re Power Contract, with covering letter dated November 11, 1954, all of which are included in Exhibit A hereto;

* * * * * * * *

[fol. 473] *Surplus* shall mean power and energy available from the Power Plant from time to time in excess of power and energy deliverable to the AEC under the Power Contract; * * *

With respect to the supply of back-up power to plaintiff, section 3.1 and 3.2 of said agreement provided:

3.1 *ALM Obligations as to Back-up:* Subject to the provisions of §§ 3.6 and 6.2, the ALM COMPANIES shall be obligated to supply and shall supply, in the aggregate, 80% of the BACK-UP power required by MISSISSIPPI VALLEY. The distribution of this obligation among such companies and accounting for payments received either in kind or in cash for BACK-UP energy so supplied shall be, as among the ALM COMPANIES, in accordance with the MEMORANDUM or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggregate loads of all of them.

3.2 *Southern Companies' Obligations as to Back-up:* Subject to the provisions of §§ 3.6 and 6.2, the SOUTHERN COMPANIES shall be obligated to supply and shall supply, in the aggregate, 20% of the BACK-UP power required by MISSISSIPPI VALLEY. The distribution of this obligation among such companies and accounting for payments received either in kind or in cash for BACK-UP energy so supplied shall be, as among the SOUTHERN COMPANIES, in accordance with the following percentages of the total BACK-UP or with such other basis on which they may mutually agree reflect-

ing a rational relationship of the load of each such company to the aggregate loads of all of them:

ALABAMA PC	8%
GEORGIA PC	8%
GULF PC	2%
MISSISSIPPI PC	2%

With respect to surplus power that might be generated by plaintiff, the agreement provided, in sections 4.1 and 4.2:

4.1 *ALM Entitlement to Surplus:* Subject to the provisions of § 6.2, the ALM COMPANIES together shall be entitled to receive an aggregate of 80% of SURPLUS power. Such SURPLUS power entitlement shall be distributed among the ALM COMPANIES in accordance with the MEMORANDUM or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggre- [fol. 474] gate loads of all of them. Subject to the provisions of this agreement, the scheduling of the SURPLUS to which the ALM COMPANIES are entitled shall be handled by the Middle South System Operator referred to in the MEMORANDUM or such other person as may succeed to the powers and functions of such System Operator.

4.2 *Southern Companies' Entitlement to Surplus:* Subject to the provisions of §§ 4.4 and 6.2, the SOUTHERN COMPANIES together shall be entitled to receive an aggregate of 20% of SURPLUS power. Such SURPLUS power entitlement shall be distributed among the SOUTHERN COMPANIES in accordance with the following percentages of the total amount of SURPLUS or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggregate loads of all of them:

ALABAMA PC	8%
GEORGIA PC	8%
GULF PC	2%
MISSISSIPPI PC	2%

186. The intercompany agreement was not required by the terms of the Power Contract. It was a lending document which was to be pledged to secure the payment of MVG's debt. As already stated, it was decided that the intercompany agreement should be signed by both sponsors and that none of the operating subsidiaries of the sponsors would sign it.

The back-up and surplus power agreement was required under section 2.02 of the Power Contract and, as stated, it was to be signed by plaintiff and by the subsidiaries of the sponsors. As security for the bonds, the insurance companies had a first mortgage on MVG's plant, a pledge of the Power Contract, and a pledge of the intercompany agreement, which the insurance companies relied upon as an obligation of the sponsors to pay for the right to receive power from MVG, whether or not the power was available. Although the intercompany agreement provided that the back-up and surplus power agreement would be entered into, the intercompany agreement did not specify the terms to be contained in the back-up and surplus power agreement. It was an operating agreement and not a lending document. The lending institutions were not interested in the provisions of the back-up and surplus power agreement. However, since the sponsors were holding companies, the [fol. 475] lending institutions wished to make sure, as a matter of mechanics, that there should be an agreement in effect for the surplus power to be taken by the operating subsidiaries.

187. With respect to the back-up and surplus power agreement, the SEC in its decision of February 9, 1955, stated that the record before it indicated that the operating companies would be fairly treated in the amounts they would receive for interim and back-up power and in the amounts they would be charged for any surplus power they took.

188. In the SEC equity financing proceedings, the SEC Division of Corporate Regulation filed a reply brief (plaintiff's exhibit 21-I) in which it was urged, among other things, that the Power Contract and related arrangements did not violate Section 12 (a) of the Public Utility Holding Act of 1935. After pointing out that the back-up and surplus power agreement was a direct obligation of the oper-

ating subsidiaries rather than of Middle South or Southern, the brief stated:

> We submit that, under all of the circumstances, no indemnity of the type envisaged by section 12 (a) of the Act is or will be created by the Power Contract and the related intercompany arrangements.

189. In its decision of February 9, 1955, approving MVG's equity financing, the SEC stated:

> We do not consider that any indemnity within the meaning of Section 12 (a) is involved. The obligation to supply MVG with interim and back-up power and to absorb cancelled power would be the direct obligation of the operating companies, not of the holding companies. While the arrangements among the system companies have not been finally determined, the record shows that the arrangements for the supply of back-up energy interim power, and absorption of power will be between MVG and the operating companies of each system, that MVG will pay those subsidiaries for such power, and neither Middle South nor Southern will obtain any payments from the AEC for power. It is proper under the Act for construction projects and operations to be planned and carried forward on a basis meeting the purposes of the system as a whole, and for the holding company to make contracts in furtherance of such coordinated operations with the intent that the operating aspects of such contracts shall be carried out by the system operating companies. The [fol. 476] creation of the attendant reciprocal benefits and undertakings involved in such arrangements does not in our view automatically result in an indemnity of the holding company within the meaning of Section 12 (a).

VI. Lack of Regulatory Approvals Defense [5]

190. Section 8.15 of the Power Contract is as follows:

Regulatory Approvals and Indebtedness: The obligations of the parties hereunder shall be subject to the following:

(1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;

(2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract;

* * * * * * *

Section 8.22 of the Power Contract is as follows:

Effective Date: The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to he Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

191. As previously stated (findings 8 and 9), the Power Contract became effective on December 17, 1954. Both parties agreed that those provisions of section 8.22 of the

[5] Paragraph 25 of defendant's answer.

Power Contract which were covered by the letter agreement had been satisfied, that the Power Contract was effective, and that the letter agreement was no longer in force.

[fol. 477] 192. On November 17, 1954, plaintiff Middle South and Southern filed with the SEC an application to authorize plaintiff to issue 55,000 shares of its common stock having a par value of $100 per share and to permit Middle South to acquire 43,450 of such shares and Southern to acquire the remaining 11,550 shares, all having an aggregate par value of $5,500,000.

Hearings on the application began in the SEC on December 7 and were concluded December 21, 1954. The State of Tennessee and the Memphis Light, Gas & Water Division appeared in opposition to the application. The findings and opinion of SEC approving the issuance and sale of plaintiff's common stock were issued February 9, 1955.

The State of Tennessee filed a petition for rehearing and this was denied by the SEC on February 18, 1955. On March 14, 1955, the State of Tennessee filed a petition for review of the SEC order in the United States Court of Appeals for the District of Columbia.

After intervening in the action in the Court of Appeals, plaintiff, Middle South, and Southern filed a motion to dismiss Tennessee's petition for review on April 13, 1955. Oral argument was heard on the motion and the Court of Appeals deferred its decision until after argument on the merits.

193. The Court of Appeals heard oral argument on the appeal of the State of Tennessee on June 6, 1955, but no decision was rendered prior to defendant's termination of the contract in July 1955. On September 12, 1955, the Court of Appeals remanded the case to SEC for reconsideration of its order of February 9, 1955. The court's action was taken pursuant to SEC's motion to remand in view of the fact AEC had been directed to cancel the Power Contract. The court's order of remand stated:

> The Court expresses no view with respect to the questions in controversy between the parties, and nothing in this order shall be deemed decisive of any such question. This order is without prejudice to any right, which may be possessed by any person aggrieved, to

judicial review of the Commission's final action in the matter.

[fol. 478] 194. By the time the Power Contract was terminated, MVG had issued and sold to Middle South and Southern only 11,000 shares of common stock, whereas the remaining 44,000 shares of common stock, the issuance and sale of which had been authorized by the SEC order of February 9, 1955, had not been issued. On November 4, 1955, SEC entered an order in which reference was made to the order of February 9, 1955, to the proceedings in the Court of Appeals, to defendant's cancellation of the contract, and to the remand by the Court of Appeals. In view of such circumstances, the SEC entered an order rescinding the authority of the plaintiff to issue and of Middle South and Southern to acquire the 44,000 unissued shares of the common stock of MVG. SEC retained jurisdiction of the question as to the action to be taken respecting the 11,000 shares of plaintiff's common stock that had been acquired by Middle South and Southern.

195. On April 22, 1955, plaintiff advised AEC that bond purchase agreements, involving an estimated total commitment of \$77,362,000 by the Metropolitan Life Insurance Company and New York Life Insurance Company had been executed on April 21, 1955. In the same letter AEC was informed that bank credit agreements, involving an estimated total commitment of \$27,086,000 by 24 banks, had been executed on April 21, 1955. The bonded indebtedness was to be secured by $3\frac{5}{8}$ percent first mortgage bonds, and the debt to the banks was to be secured by the execution and delivery of notes bearing interest at $3\frac{1}{4}$ percent. All participating banks had signed the bank credit agreement by May 15, 1955.

196. Plaintiff's application for approval of the financing to be obtained from the insurance companies and the banks was filed with the SEC on April 22, 1955. A hearing on the application was set for May 6, 1955, but postponed until June 6, 1955. The hearing began on June 7 and ended on June 17, 1955. The SEC had made no decision on the application as of July 11, 1955, when the defendant decided to cancel the Power Contract.

197. On November 23, 1954, plaintiff and the sponsors filed with the Arkansas Public Service Commission an applica-

[fol. 479] tion to authorize plaintiff to issue and the sponsors to acquire shares of plaintiff's common stock. An order approving the application was entered on December 21, 1954.

198. On December 29, 1954, plaintiff applied to the Commissioner of Internal Revenue for approval of plaintiff's proposed method of charging depreciation, and this method was accepted by the Commissioner on March 8, 1955.

199. On January 3, 1955, plaintiff applied to the District Engineer of the Memphis District of the Corps of Engineers for permission to construct coal unloading and water condensing structures in the Mississippi River, West Memphis, Arkansas. The permit was granted February 11, 1955.

200. On February 18, 1955, plaintiff applied to the Arkansas Public Service Commission for a certificate of Public Convenience and Necessity. After a hearing, the Commission granted the certificate on March 9, 1955.

201. In March 1955 certain officers and directors of Middle South and Southern, including Yates and Barry of Southern, and Dixon, Canaday, and Sanders of Middle South, filed an application to hold interlocking positions on plaintiff's board pursuant to the provisions of Section 305 (b) of the Federal Power Act and Part 45 of the Rules and Regulations of the Commission.

On April 4, 1955, the State of Tennessee intervened in the proceedings and objected to the approval of the applications. As of May 4, 1955, both parties had filed a memorandum of law with the Commission but no action had been taken by it. On July 2, 1956, each application was withdrawn by the applicant on the ground that on July 30, 1955, the AEC had advised MVG that AEC had been directed to terminate the Power Contract.

202. Among the regulatory approvals that were contemplated by section 8.15 (1) of the Power Contract was the approval by the Civil Aeronautics Authority of the lighting of the transmission towers. Such approval could not have been obtained until near the end of the construction period.

203. (a) The question of the extent to which the effectiveness and enforceability of the Power Contract were affected by the lack of regulatory approvals was fully treated in the opinion the General Counsel of AEC submitted to the

[fol. 480] Atomic Energy Commission on July 11, 1955. The opinion read in part as follows:

> * * * those described in paragraphs (1) and (2) [of Section 8.15] have not been fully satisfied at this date. A question has been raised as to whether the conditions stated in Section 8.15 limit the effectiveness of the contract so that the contract will not become effective and binding on the parties until these conditions are fully satisfied.
>
> The intention of the parties, as derived from the contract as a whole, is clear—that the contract was to become effective on the date specified in Section 8.22 (December 17, 1954). Section 8.15 does not purport to fix the effective date of the contract. It is significant that conditions (3) and (4) of Section 8.15 are identical with events (b) and (c) of Section 8.22. In Section 8.22 these two events must occur before the contract becomes effective. The inference is clear that the other two conditions of Section 8.15; viz, the receipt of regulatory approvals and the execution and performance of financing commitments, do not go to the effective date and do not prevent the contract from being presently in effect.
>
> An interpretation of Section 8.15 as imposing limitations on the effectiveness of the contract would be clearly inconsistent with other substantive provisions of the contract. Condition (2) of Section 8.15 involves the *the* execution and performance by institutional investors and banks of contracts or commitments providing for the issuance by the Company and the purchase by such investors and banks of the Company's long-term debt issuances. It was clearly understood by the parties that the performance of these financing arrangements would involve a serious [series] of transactions providing for the periodic take-down of funds by MVGC during the period of construction of its plant. The last of these transactions would undoubtedly occur towards the end of the construction period—at a date two years or more after the effective date of the contract.
>
> If the binding effect of the contract were to be delayed until performance of the last of these transactions, then

all of the provisions of the contract bearing on the rights and obligations of the parties during the construction period would be nugatory until the last transaction was completed. The obligations of MVGC to design and construct the Plant would be unenforceable. The company's obligation to supply Preliminary Contract Capacity upon completion of the first generating [fol. 481] unit would be unenforceable if such completion preceded the completion of the last financial transaction. The right granted to AEC under Section 7.07 to assign to TVA the right to power under the contract, and the rights and obligations of the parties in the event of cancellation of the contract during the construction period would all be meaningless if the contract were not to be effective during the construction period. During this period, the valuable right of the Government to recapture the plant under the provisions of Section 7.09 would be an illusory one. MVGC would not be bound by the many statutory and regulatory requirements, such as those contained in the Anti-Discrimination, Security and Eight-hour law provisions of the contract. Certainly, the parties could not have intended and did not intend that all of these provisions, so carefully negotiated to fix the rights and obligations of the parties during the construction period, were to have no force and effect until the last borrowed dollar had been paid over by the lending institutions.

* * * * * * *

It is my opinion that the conditions stated in Section 8.15 are conditions subsequent—such conditions that the non-occurrence of any one of them may excuse the parties from further performance of the contract. Thus, if it should develop at some future date that the Company was unable, after a reasonable time, to obtain the requisite regulatory approvals and debt financing, both parties would be relieved of liability on account of any failure to perform thereafter their contract obligations. The existence of these conditions subsequent imposes upon the parties certain obligations in the form of implied conditions of the contract. There is an implied

obligation on both parties to proceed in good faith and with due diligence to perform such actions as may be required of the respective parties in order to permit the satisfaction of the conditions. AEC has satisfied its obligation in this respect by furnishing to MVGC the opinions referred to in Conditions (3) and (4). MVGC has proceeded with due diligence to take the necessary steps towards obtaining the required regulatory approvals and has executed the agreements for its debt financing.

There is a further implied obligation of the parties in this situation to refrain from any action that would prevent the fulfillment of any of the conditions subsequent. A party would not be relieved of its obligations under the contract due to the non-fulfillment of one of the conditions if the failure to fulfill the condition were [fol. 482] due to its own action. If, for example, AEC were to repudiate the contract and, as a result of that repudiation, SEC failed to approve the MVGC debt financing, AEC could not assert that it was relieved of its obligations under the contract because of the non-fulfillment of Condition (1) of Section 8.15.

(b) Substantially the same conclusion was expressed in the Comptroller General's opinion (plaintiff's exhibit 96) sent to the AEC on July 29, 1955.

(c) In the brief which the United States filed as *amicus curiae* in the Court of Appeals before the contract was terminated (plaintiff's exhibit 28), there was a statement which is in accord with the material quoted in (a) above.

VII. Lack of Mutuality Defense

204. In this defense, which is set forth in paragraph 26 of defendant's answer, the defendant is relying upon the provisions of section 8.15 of the Power Contract. Aside from the provisions of the Power Contract (plaintiff's exhibit 1), no evidence was offered in support of this defense.

VIII. Damages

A. General

205. The only provisions of the Power Contract relating to termination and cancellation are sections 7.02 and 7.07.

The first of these, which is entitled "Termination", is applicable only after the commencement of commercial operation of the third unit of the plant, or 42 months after the effective date of the contract, whichever is earlier. Section 7.07 is entitled "Cancellation Prior to Completion" and provides in part as follows:

1. If prior to the commencement of commercial operation of the third unit of the Facilities, the power requirements of the AEC at the Projects are so reduced that it will no longer require service hereunder, the AEC may assign to TVA the right to power and energy hereunder in accordance with the terms hereof. Acceptance of such assignment by TVA and notice thereof to the Company by the AEC shall have the effect of the delivery of a notice of termination by the AEC at the earliest date possible under Section 7.02. If the AEC advises TVA that such assignment to it [fol. 483] is available and ascertains that TVA has concluded that it does not need the power hereunder during the period which such assignment would cover, the AEC shall be entitled to cancel this contract by delivering a written notice of cancellation to the Company, and such notice shall have the effect set forth in paragraph 2 or paragraph 3 of this Section, whichever is applicable.

2. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company prior to the time when the Company shall have incurred expenditures on account of the cost of the Facilities as referred to in Section 4.02 which, together with the costs (estimated where necessary) of cancellation of commitments made in that connection, shall equal $40,000,000, this contract shall terminate on such date after the delivery of such notice as shall be specified therein. In such event, the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable

liabilities, costs, indebtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, including carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; and the AEC shall be entitled to, and shall remove from the site of the Facilities at its own cost and expense and within a reasonable time, all items of personal property heretofore acquired by the Company and not returned or returnable to a vendor in connection with the cancellation or revocation of a contract or commitment, and may remove from the site of the Facilities at its own cost and expense and within a reasonable time all items of property acquired by the Company which have been so attached to the land or any structure thereon as to become realty, provided any injury to the land caused by such removal shall be made good. The AEC shall have the right, in lieu of reimbursing the Company for cancellation charges or payments on any purchase contract or order, to take over such purchase contract or [fol. 484] order upon the agreement by the AEC to assume all liabilities thereunder and hold the Company harmless therefrom. The AEC shall make payment of amounts payable hereunder from time to time and as soon as practicable to the end that the aggregate amounts payable by it hereunder shall be reduced so far as possible and the Company will undertake to cooperate with the AEC for that purpose.

206. In section 1.09 of the Power Contract, "Project" is defined to include an AEC installation at Oak Ridge, Paducah, or Portsmouth, or "any other installation for which it may become lawful for the AEC to receive electric utility service under this contract."

As previously stated, AEC has no installation at West Memphis, Arkansas, or in that area.

At the time the Power Contract was cancelled, there had been no reduction in the power requirements of AEC at its Oak Ridge, Paducah, or Portsmouth installations. Instead, AEC then needed additional power at its Oak Ridge

installation. The defendant did not cancel the contract as a result of a reduction in AEC's requirements for power at any of its installations. It cancelled the contract when the city of Memphis decided to erect its own generating facilities and the defendant determined that it would have no need for the power to be generated by plaintiff's plant.

In the discussions between plaintiff's representatives and AEC after August 1, 1955, plaintiff's representatives took the position that the provisions of section 7.07 of the Power Contract applied to the cancellation. Plaintiff's representatives offered to waive that portion of section 7.07, which related to reductions in the power requirements of AEC, but the offer to waive was not accepted by AEC.

207. MVG was organized for the sole purpose of making the Power Contract and for constructing and operating the facilities provided for therein. Until the date of termination, MVG had engaged in no business other than that directly concerned with the Power Contract and the construction of the facilities contemplated in the contract.

Except for activities directly related to the cancellation of the contract and the prosecution of this action, the only business activity which MVG has engaged in since termina- [fol. 485] tion has been the renting of the plant site for farming purposes.

B. Mitigation of Damages

208. When plaintiff learned by telephone on July 11, 1955, that the President had decided to order termination of the Power Contract, it immediately notified Ebasco. On July 15, 1955, Ebasco was directed to stop all work on the project, to terminate all purchase orders, to cancel all contracts, and to transfer all personnel at the site except employees needed to shut down the job. On July 13, 1955, Ebasco discussed cancellation of purchase orders with the Westinghouse Electric Corporation and the Babcock & Wilcox Company. By July 30, 1955, all contracts at the site had been terminated and work on the major items of equipment had been suspended. The personnel at the site had been removed as rapidly as possible and the engineering work was terminated to the fullest extent practicable.

AEC did not give plaintiff formal notice of termination until August 1, 1955. Although there were some discussions about plaintiff's obligations to third parties and as to steps that could be taken to minimize the damages, the AEC representatives told plaintiff that AEC had received no directive as to post-termination activities and could not give plaintiff any instructions pertaining thereto. Plaintiff continued to keep AEC informed as to the steps it was taking to close out the project until AEC ended the post-termination discussions in October 1955. The evidence shows that plaintiff was diligent in its efforts to mitigate damages following defendant's termination of the contract.

209. Since the filing of the petition, the following claims described in paragraph 16 of the petition have been withdrawn without cost to either party:

The Babcock & Wilcox Company	$ 204,216.40
Bowers & Wood Manufacturing Co.	15,978.72
Elliott Company	11,890.02
Fisher Steel Corporation	14,949.20
The Griscom-Russell Company	5,961.60
Westinghouse Electric Corporation	1,208,743.00
Worthington Corporation	6,613.92
Total	$1,468,352.86

[fol: 486] C. The Claim of Dickmann-Pickens-Bond Construction Company

210. This claimant entered into a contract with Ebasco, as agent for plaintiff for the furnishing, driving, and concreting of the concrete piles for the facilities to be constructed pursuant to the Power Contract at West Memphis. At the time of termination, the claimant had moved equipment to the site but had driven no piles. The parties have agreed that the sum of $14,553.03 is a fair and reasonable charge for the services performed, and that if the court determines that the defendant is liable on the merits and is obligated to reimburse plaintiff for the services of the claimant, judgment may be entered in the amount stated above.

D. The Claim of Jackson Life Insurance Company

211. This claim was settled by plaintiff. The amount of the settlement is included in plaintiff's claim and the facts pertaining thereto are set out in the findings relating to plaintiff's claim.

E. The Claim of J. A. Jones Construction Company

212. Pursuant to written contract entered into between Ebasco, as agent for MVG, and the J. A. Jones Construction Company, the claimant, its joint venturers and subcontractors, performed work at the site, including yard grading, embankment filling, the concreting of foundations, and related work. It has been stipulated that the fair and reasonable value of the work is the sum of $243,160.33, of which plaintiff has paid $100,000 that is now included in its claim. The parties have agreed that the unpaid balance of $143,160.33 includes an item of $11,027.79 due the Oman Construction Company for the rental of equipment, and that if judgment is entered for $143,160.33 on this claim, the $11,027.79 may be deducted for direct payment to Oman Construction Company.

F. The Claim of Pandick Press, Inc.

213. This claim is for the cost of printing documents for plaintiff. In connection therewith, the parties have agreed that the categories of documents printed and the amounts [fol. 487] which are the fair and reasonable costs of the services performed by the claimant as to each category are as follows:

Contract Drafts	$17,412.97
Corporate Organization	300.96
Financing	16,170.84
SEC Approval	5,394.65
Back-up and Surplus Power Agreement	1,608.81
Court of Appeals Proceedings	2,450.53
Total	$43,338.76

Plaintiff has paid $5,000 on account to the claimant, leaving a balance of $38,338.76 due. The $5,000 is included as a part of plaintiff's claim hereinafter set out.

Defendant reserved the right to contend that any or all of the work performed by the claimant is not a proper item of damage. The following is a brief summary of the facts relating to each category of printing:

(1) The item of $17,412.97 covers the cost of printing numerous copies of many drafts of the contract documents. As previously stated, nine separate proofs of the Power Contract were printed during the period of the negotiations. As a particular proof became unusable, it was mutually agreed that new proofs would be obtained. The number of copies to be printed was generally based on the number of copies requested by the AEC, since plaintiff's representatives did not use many copies.

(2) The item of $300.96 is for the cost of printing the articles of incorporation and the bylaws of plaintiff in connection with its corporate organization.

(3) The sum of $16,170.84 is the amount charged for printing the mortgage and deed of trust, the bond purchase agreement and the bank credit agreement. These costs were incurred in connection with the financing obtained by plaintiff from institutional investors and banks as referred to in section 8.15 (2) of the Power Contract.

(4) The item of $5,394.65 covers the costs of printing various documents filed by plaintiff with the SEC in connection with its efforts to obtain SEC approval of its equity and debt financing pursuant to section 8.15 (1) of the Power Contract.

(5) The sum of $1,608.81 represents the cost of printing the back-up and surplus power agreement which MVG was [fol. 488] required by section 2.02 of the Power Contract to enter into with the eight subsidiaries of the sponsors.

(6) The item of $2,450.53 covers the cost of printing briefs and other documents filed in the Court of Appeals in connection with the appeal from the SEC order in the equity financing proceedings.

G. The Claim of Reid & Priest

214. The claimant is a law firm which was retained by plaintiff about July 22, 1954, to render legal advice with respect to Federal, State, and local taxes, but the legal services were limited almost entirely to matters relating to Federal taxes. The services included consultation with officers of plaintiff regarding the tax consequences of the proposed power contract, analysis of the proposed contract in light of the provisions of the Internal Revenue Code, and tax advice regarding language to be included in the proposed contract. The firm also prepared and filed an application pursuant to section 4.09 of the Power Contract for a ruling from the Internal Revenue Service on the tax consequences of sinking fund depreciation with respect to the proposed West Memphis plant.

The parties have agreed that the sum of $6,500 is a fair and reasonable fee for the services performed and that the firm incurred disbursements of $597.12. The parties have also stipulated that if the plaintiff is entitled to recover and that if defendant is obligated to reimburse plaintiff for claimant's services, judgment in the sum of $7,097.12 may be entered on this claim.

H. The Claim of House, Moses & Holmes

215. This law firm, now known as House, Holmes, Roddy, Butler & Jewell, was retained shortly after plaintiff was incorporated under the laws of Arkansas on July 19, 1954, to represent plaintiff on legal matters in Arkansas. The firm rendered opinions as to plaintiff's legal status in Arkansas and obtained from the Arkansas Public Service Commission (a) a certificate of Public Convenience and Necessity, (b) authority for the issuance and sale of plaintiff's common stock, and (c) authority for plaintiff's debt fi- [fol. 489] nancing. The firm also rendered an opinion as to plaintiff's liability under Arkansas tax laws.

The parties have agreed that if the court holds that defendant is liable and is obligated to reimburse plaintiff for the value of such service, a judgment in the sum of $7,500 may be entered on this claim.

I. The Claim of Arthur Andersen & Co.

216. This firm was retained by plaintiff to render accounting services to it. The major categories of work performed, and the charges therefor, which are reasonable, were as follows:

(a)	Assistance and consultation on accounting matters applicable to power contract with AEC	$ 3,635.71
(b)	Preparation of projections of deb. amortization, depreciation and income for statements used in application to Treasury Department	3,976.42
(c)	Preparation of memorandum on accounting matters relating to power contract and discussion thereof with staff of FPC and AEC	329.29
(d)	Review and consultation on accounting aspects of indenture, bond purchase agreement, bank credit agreement and supplementary agreement	321.43
(e)	Preliminary review of Ebasco charges, and review of final engineering and construction costs	851.00
(f)	Review and consultation on Ebasco's proposed construction estimating and cost control procedures	1,253.14
(g)	Preparation of various monthly reports of expenditures made and obligations incurred	1,033.29
(h)	Assistance in preparation of preliminary memorandum of accounting records, procedures and forms	516.15
(i)	Consultation and advice from time to time on miscellaneous accounting matters	332.14
(j)	Examination of February 28, 1955, balance sheet required to be filed with bond purchasers under proposed bond purchase agreement	617.43
(k)	Review of proposed procedures for settlement of claims of contractors and venders in connection with cancellation of contract	3,442.57
(l)	Miscellaneous and unclassified	295.43
	Total	16,604.00

[fol. 490] These services were performed, and disbursements were made during the following periods of time:

	Fee	Disbursements
July 26 through November 10, 1954	$6,377.86	$440.21
November 11, 1954 through July 11, 1955	6,416.71	147.69
July 12, 1955 through October 12, 1956	3,809.43	757.33
Total	16,604.00	1,345.23

However, due to minor bookkeeping discrepancies, this firm billed plaintiff for a fee of only $16,425 and disbursements of $1,344.66. Plaintiff has paid $1,300 on the account and that payment is included in its claim. The payment reduces Arthur Andersen & Company's claim to the net amount of $16,469.66.

J. The Claim of Middle South Utilities, Inc.

217. The claimant is one of two parent companies of the plaintiff. The parties have stipulated that the books of the claimant reflect an account receivable from the plaintiff in the amount of $4,651.86, consisting of the following:

Expenses applicable to so-called equity proceedings before the SEC	$4,455.37
Telephone toll calls	160.16
Express charges	16.61
Photoprints	6.43
Hotel expense	13.29

The parties have also agreed that such charges are fair and reasonable for the articles purchased or the services performed. However, with respect to the first item of $4,455.37, it is the defendant's position that this amount is not a proper charge against either the plaintiff or the defendant. The disputed item of $4,455.37 includes the sum of $2,429.63 paid for three copies of the transcript of the SEC hearing on MVG's stock financing, and $2,025.37 paid for the printing of documents filed in the same SEC proceeding. One copy of the transcript referred to was for examination, study, and use by the officers and employees of plaintiff and of Middle South in Washington, D. C., during and after the pendency of proceedings before SEC; [fol. 491] a second copy was for the examination, study, and use by the officers and employees of plaintiff and Middle South in New York, N. Y., during and after the pendency of the proceedings before SEC, and the third copy was for examination, study, and use by the law firm of Cahill, Gordon, Reindel & Ohl which was counsel for plaintiff and for Middle South in the SEC proceedings. The sum of $1,619.75 of the amount paid for copies of the transcript was an unnecessary expenditure and is not a proper charge against either plaintiff or defendant.

The Power Contract recited that Middle South and Southern had caused MVG to be organized and had agreed to subscribe to and purchase its capital stock. As previously stated, section 8.15 of the Power Contract provided that the obligations of the parties thereunder were subject to the receipt of the regulatory approvals that were needed to

permit plaintiff to issue and sell shares of its capital stock to Middle South and Southern. Middle South and Southern joined in the application filed by MVG in SEC, because it was necessary under Section 10 of the Public Utility Holding Act of 1935 for Middle South and Southern, as holding companies, to obtain SEC authority to acquire the common stock of MVG.

K. The Claim of the Southern Company

218. This claimant is the other parent company of plaintiff. The parties have stipulated that the books and records of Southern reflect an account receivable from plaintiff in the amount of $29,391.29, of which $6,095.43 represents amounts expended directly by Southern and the balance of $23,295.86 represents payments made by Southern to Southern Services, Inc., for professional services. It is also agreed that the amounts paid are fair and reasonable costs for the articles purchased and the services performed.

Southern's claim includes the following categories of expenditures:

Cost of transcript of proceedings before Joint Committee on Atomic Energy	$1,643.20
Cost of printing U-1 material to be filed with SEC re equity financing	1,254.54
[fol. 9[illegible]] Cost of transcript of oral argument before SEC	133.41
Cost of transcript of proceedings before SEC on equity financing	2,420.40
Cost of printing U-1 material to be filed with SEC re debt financing	643.88
Payments to Southern Services, Inc., for salaries, overhead and travel expenses of its personnel on the following categories of work:	
(a) Assistance in formulating the proposal of April 10, 1954 to AEC	2,446.55
(b) Assistance in negotiating the power contract	2,999.28
(c) Studies with respect to the integration of plaintiff's power facilities with the Southern system, as required by the power contract, and preparation for and presentation of evidence relating thereto at the SEC equity proceedings	13,547.82
(d) Study and advice in connection with plaintiff's proposed power arrangements with systems of the sponsoring companies as contemplated by Section 2.02 of the power contract	650.45
(e) Study and advice in connection with plaintiff's arrangements with Ebasco for engineering and construction services in relation to plaintiff's facilities	1,934.42
(f) Participation in work of joint AEC-TVA-MVG Committee for cooperation established for purposes of compliance with Section 2.03 and similar requirements of the power contract	1,717.34

Defendant contends that the first five items in the foregoing table represent costs incurred by Southern in seeking authority from SEC to acquire plaintiff's stock and that such expenditures are not a proper charge against either plaintiff or defendant. As stated in the preceding finding, Southern and Middle South joined plaintiff in the application filed with SEC in order to obtain approval for Middle South and Southern to purchase plaintiff's common stock, as required by Section 10 of the Public Utility Holding Act of 1935. The sums expended by Southern in the SEC proceeding include $3,808.35 paid directly by it, and $13,547.82 (item (c) in the table above), paid to Southern Services, Inc.

[fol. 493] In addition to its general contention respecting Southern's expenses in the SEC stock proceeding, defendant takes the position that the amounts paid for a transcript of proceedings before the Joint Committee on Atomic Energy ($1,643.20), for a transcript of the oral argument before SEC ($133.41), and for a transcript of the equity proceedings before SEC ($2,420.40) were unnecessary and unreasonable. Three copies of each of the transcripts were purchased. One copy was for the use of Southern in New York where the chairman of the board had his office, one copy was for Southern's use in Birmingham, Alabama, where the chairman of the executive committee had his office, and the third copy was for the use of Southern's counsel, Winthrop, Stimson, Putnam & Roberts. The sum of $2,798.01 of the amount paid for copies of such transcripts was an unnecessary expenditure and is not a proper charge against either plaintiff or defendant.

Defendant denies liability for the remainder of the items listed in the table and which are amounts paid to Southern Services, Inc., on the ground that the interpretative memorandum entered into between plaintiff and AEC on November 11, 1954, contained the following provision:

> Section 4.02. It is understood that the cost of the Facilities, as defined in the second sentence of this Section, shall not include any travel or similar expenses incurred by or salary paid to any officer or employee of Middle South Utilities, Inc. or The Southern Company in the preparation and presentation of the proposals

made by the Company to AEC or in the negotiation of the Contract. The foregoing statement is not intended to create any implication as to the allowability or non-allowability of any other item of cost.

L. The Claim of the Arkansas Power & Light Company

219. The claimant is a utility company which agreed with plaintiff to supply the temporary electric power and energy required during the construction of the plant at West Memphis. The claimant made expenditures in installing the electric facilities at the site and incurred costs in the removal of the facilities upon advice that the contract had been cancelled and that plaintiff had no need for the power. [fol. 494] The parties have stipulated that if the court holds that plaintiff is entitled to recover on the claim, the amount of the recovery shall be the sum of $7,484.09.

Frequently, the Arkansas Power & Light Company builds temporary facilities to furnish power at a site during the construction of a plant. Generally, the company makes no charge for installing and removing the facilities but looks to the revenue derived from the sale of power for its profit on the transaction.

Sometime during June 1955, the president of the Arkansas Power & Light Company wrote plaintiff, offering to provide power on the basis of a stated minimum charge to be paid by plaintiff during the entire construction period. Plaintiff considered that the quoted minimum charge was too high, and Canaday telephoned claimant's president that the proposal was unacceptable to plaintiff. Thereupon, claimant's president replied that his company would proceed to erect the facilities and that the basis of its compensation could be worked out later. The Power Contract was terminated before an agreement as to the consideration to be paid the claimant was made. Thereafter, the Arkansas Power & Light Company submitted the above described claim to plaintiff.

M. The Claims of The First National City Bank of New York and of White & Case

220. These claims are treated together, since the same facts pertain to each.

The bank had been selected as trustee in the proposed

mortgage and deed of trust to be executed by plaintiff as security for the payment of its bonds. The mortgage and deed of trust was prepared, printed, and dated as of April 1, 1955, but it was never signed. Article 15, section 15.01 of the mortgage (plaintiff's exhibit 43, p. 137), provided that the trustee would receive reasonable compensation for all services rendered by it and that such compensation, plus reasonable compensation of the trustee's counsel and reasonable expenses incurred by the trustee, would be paid by plaintiff on demand from time to time as the services were rendered or the expenses incurred.

[fol. 495] The services performed by the bank as prospective trustee included the review of various proofs of the proposed mortgage, the proposed bond purchase agreement, the proposed intercompany agreement, and the proposed bank credit agreement. The trustee also consulted with White & Case, its counsel, and studied the documents described above to determine whether they were administratively workable and were satisfactory from the standpoint of the trustee.

The law firm of White & Case, counsel for the trustee, reviewed the various proofs of the documents referred to in the preceding paragraph, as well as a draft of proposed excerpts from minutes of the meeting of plaintiff's stockholders and a draft of proposed excerpts from minutes of the meeting of plaintiff's board of directors. The firm also rendered advisory service to the trustee regarding these documents for the purpose of ascertaining that they afforded the customary protection to the trustee and would be satisfactory from its standpoint.

No written contract or other agreement was entered into between plaintiff and the trustee or between plaintiff and White & Case for the payment of the services included in these claims. However, since the mortgage and deed of trust provided for the payment of compensation to the trustee and to its counsel and since the services were rendered by both at plaintiff's request, plaintiff's position is that it is obligated to pay them. The parties have agreed that if the court determines that plaintiff is entitled to recover herein and is obligated to reimburse plaintiff for the services performed by the bank and by White & Case, judg-

ment may be entered on the bank's claim in the amount of $500 and on the claim for White & Case for $500.

N. THE CLAIM OF MISSISSIPPI VALLEY GENERATING COMPANY

221. Plaintiff in its own right claims the sum of $618,674.85, consisting of the following major items:

Payment to Ebasco in 1954 billing	$216,559.47
Payment to Ebasco as agent for MVG	183,861.29
MVG charges	218,254.09

The claim has been audited, and it has been agreed that the amount stated above correctly reflects the entries on the books of MVG. However, MVG overpaid Ebasco's 1954 [fol. 496] bill by the sum of $16.78, which is to be deducted from the claim.

(a) Payment to Ebasco on 1954 Billing

222. Ebasco commenced working for plaintiff about March 1, 1954, under work orders. The working agreement between the parties was resolved into a written contract which became effective April 20, 1955. Ebasco performed many services for plaintiff and incurred a substantial amount of expenses in plaintiff's behalf before the MVG-Ebasco contract was effective.

223. On June 1, 1955, Ebasco submitted to plaintiff a bill for $216,559.47 covering Ebasco's services in the period from March through December 1954. Plaintiff paid the bill on June 8, 1955, charging $208,845.63 thereof to an account entitled "Construction Work in Progress", and the balance of $7,713.84 to "Unamortized Debt Discount and Expense."

224. It is defendant's position that the amounts paid by plaintiff to Ebasco in 1954 did not represent the fair and reasonable value of the services performed and the costs incurred by Ebasco and that such charges were not necessary or proper for the performance of the contract.

225. With the exception of the amount of $7,713.84, the

total charges paid by plaintiff to Ebasco in 1954 were incurred in the following months:

March	$9,973.07
April	13,403.00
May	2,773.04
June	2,713.40
July	27,113.96
August	24,793.44
September	38,478.16
October	34,141.45
November	32,013.43
December	23,742.68

226. The services performed by Ebasco during the period from March through June 1954 consisted largely of preliminary engineering and the making of estimates for the facilities to be constructed under the Power Contract. As previously stated in finding 95, Ebasco furnished the basic estimates which were correlated by the engineers of the sponsors for the preparation of the proposal of April 10, [fol. 497] 1954. The cost of such services is included in Ebasco's 1954 bill which was paid by plaintiff. Much of the information furnished by Ebasco for the preparation of the proposal was data of the kind that was ultimately needed for the construction of the contract facilities. Ebasco's records were not kept in such a way as to differentiate between its charges for services in preparing the data for the April 10 proposal and for similar information required in construction planning, but it is reasonable to conclude that Ebasco's charges for the month of March 1954 in the sum of $9,973.07 were primarily for service rendered in assisting the sponsors to prepare the proposal of April 10, 1954.

Prior to July 1, 1954, Ebasco's engineers traveled to Washington, D. C., for the purpose of providing information to representatives of the defendant and to the sponsors for a better understanding of the proposal of April 10, 1954. While an accurate determination of the cost of such services cannot be made from Ebasco's records, a fair and reasonable approximation thereof is the sum of $7,000.

227. After July 2, 1954, Ebasco's work on the engineering, design, and construction planning of the contract facilities

proceeded at an accelerated rate, because of the target date for the completion of the first generating unit of the power plant. Much of this work was completed before the Power Contract was executed and included the conceptual design of the plant, surveys and subsurface exploration at the site, studies and consultations regarding the specifications for the major items of equipment, planning for subcontract work and for construction housing, discussions with Government and State engineers on the location of the plant, and other construction planning. The evidence shows that most of the services performed and expenses incurred by Ebasco from July 2 to November 10, 1954, related to the construction of the power plant and other facilities. However, the following services do not fall in that category:

(1) The charge of $7,713.84 (referred to in finding 223), covered the preparation by Ebasco of statements of anticipated operating results, cash flow statements, and other data for the consideration of the institutions which were to provide MVG's debt financing. In order to finance the construction and to avoid delays, it was necessary to antici- [fol. 498] pate the cash requirements and to make adequate provision for the same. The services of competent engineers were required for these purposes, and the evidence establishes that Ebasco's charge of $7,713.84 was a fair and reasonable amount for the work.

(2) During the negotiation of the Power Contract from July 1 through November 10, 1954, Seal of Ebasco participated in most of the negotiating sessions. His services were paid for by the sponsors and are not included in any claim in this action. In addition, Ebasco's engineers spent some time and travel in furnishing information needed by the negotiators, but the extent of Ebasco's charges for such work cannot be ascertained from the record.

(3) In December 1954, Ebasco's engineers rendered some services in preparing for and in testifying at the SEC equity proceedings. Here again, the charge for such services cannot be ascertained from the records.

228. Ebasco's charges for 1954 were incurred in the following periods and (exclusive of the audit adjustment of $16.78) in the following amounts:

March to June	$28,862.51
July to November 10	137,716.76
November 11 to December 31	49,963.42
Total	216,542.69

(b) Ebasco, as Agent for MVG

229. Plaintiff's cost in this category amounted to $183,861.29 and the parties have agreed that this amount correctly reflects the entries appearing on plaintiff's books. The amount claimed represents out-of-pocket expenses which were incurred during the periods and in the amounts as follows:

March 1 to November 10, 1954	$54,847.01
November 11 to December 31, 1954	8,804.79
January to July 1955, inclusive	112,457.64
Subsequent to July 1955	7,751.85

Expenditures prior to November 11, 1954, represent field engineering work on land acquired under option in March 1954. The work consisted of field surveys, the drilling of test holes, soil testing, the grading of an access road, and other preparatory work which was necessary for the con- [fol. 499] struction of the power plant and appurtenances. The defendant contends that it is not liable for the portion of such expenses that were incurred prior to November 11, 1954, the date the Power Contract was executed, and also claims two offsets.

For the first of these offsets, it is defendant's position that the highest and best use of the land acquired for the site of the plant is for industrial purposes and that the cost of the following described work, performed partly in 1954 and partly in 1955, is of permanent value to plaintiff:

Field surveys—C. H. Bond Engineering Co.	$10,000.28
Equipment rental for surveys	1,456.25
Water testing service	202.48
Automobile rental	199.77
Maps and engineering data	39.42
Test drilling for location survey—Ebasco	3,367.13
Borings—Eustis Engineering Co.	44,015.08
Borings—Eustis Engineering Co.	2,577.00
Soil testing—Barrow Agee Laboratories	7,253.00
Soil testing—Barrow Agee Laboratories	1,851.66
Test piles—Consolidated Contractors	19,951.31
Foundation consultant—Arthur Casagrande	445.00
Total	91,358.38

Aside from the work done by plaintiff, the land has never been used for industrial purposes and is now operated as a farm. The area in which the work was performed was damaged for farming purposes, because the steel pipes that formed the test piles protrude from the ground and interfere with the plowing.

The total tract comprises about 600 acres and was first considered for purchase by the Mississippi Power & Light Company. The tract as a whole will fit into the long-time plans of Middle South. The value, if any, added to the land by the expenditures described above depends upon whether the land will be used for industrial purposes and particularly upon whether any plant erected thereon will be sufficiently similar to the MVG plant in type, size, and location that the data obtained can be used to decrease the costs of planning and construction. Such value, if any, is not presently determinable.

The second offset asserted against the claim in category (b) relates to the sale of certain capital assets. During [fol. 500] 1955, Ebasco, as agent for plantiff, acquired a number of capital assets for the construction work. The assets consisted of automobiles, prefabricated buildings, building supplies and equipment, and office supplies. The property was acquired at a total cost of $60,820.85 and was sold, largely during May and June of 1956, for a total of

$35,642.06. The expenses of maintaining and disposing of the property amounted to $3,707.64, and the net amount realized was $31,934.42. The defendant asserts that if the property had been sold in 1955, it would have brought higher prices and that the cost of maintenance and sale would have been considerably reduced. In the post-termination discussions between plaintiff and AEC in July or August 1955, the AEC representatives directed plaintiff not to dispose of the above-described property, stating that it could be taken into the AEC stores in the event the parties were able to agree upon some basis of settlement. Plaintiff was not able to obtain specific directions from AEC about the disposition of the assets and the settlement discussions ended in October 1955. On November 23, 1955, plaintiff was advised that the defendant would not recognize any obligations of the contract. The evidence shows that that amount realized from the sales, as well as the expenses incurred in connection therewith, is fair and reasonable.

No other questions have been raised regarding the amount claimed in the category of "Ebasco as Agent for MVG."

(c) MVG Charges

230. Plaintiff's claim under this heading amounts to $218,254.09 for expenses incurred during 1955, and the first classification under which these charges are grouped covers the following partial payments and payments on account:

J. A. Jones Construction Company	$100,025
Pandick Press	5,000
Arthur Andersen & Co.	1,300
Winthrop, Stimson, Putnam & Roberts	4,000
Ebasco	16,000
Cahill, Gordon, Reindel & Ohl	11,000
Assignee of Jackson Life Insurance Company	10,000
Total	147,325

[fol. 501] It is conceded that the $100,000 paid to J. A. Jones Construction Company was a fair and reasonable payment, but defendant urges that the remaining $25 paid to that company was not a reasonable or necessary expense. After the termination of the Power Contract, one of Jones' subcontractors threatened to bring suit. In order to forestall this action and to allow time for further discussions with AEC, plaintiff and Jones entered into a written agree-

ment, providing that neither Jones nor any of its subcontractors would sue plaintiff pending a final determination of its claim against defendant. The twenty-five dollars was paid as a consideration for the agreement.

On May 27, 1955, plaintiff entered into a contract with Jackson Life Insurance Company, one of the use-plaintiffs, for the purchase from the latter of "200,000 yards of sand, and as much sand in addition thereto, not to exceed 500,000 yards for the price of $0.10 per yard." Prior to the termination of the Power Contract, 19,978 yards of sand had been removed. Jackson Life Insurance Company insisted that it be paid for 200,000 yards of sand, and plaintiff's counsel advised that the insurance company's contention was valid. Thereafter, the assignee of Jackson Life Insurance Company filed suit against plaintiff to recover the sum of $18,002.20 representing the value of the 200,000 yards of sand, less the amount previously paid for the sand already removed. Plaintiff settled the suit by an agreement of March 29, 1956, whereby plaintiff paid the assignee a cash consideration of $10,000, and plaintiff received a deed granting to it and its assigns the right, without further payment, to remove 100,000 yards of sand, dirt or soil from the site at any time prior to March 26, 1966. Plaintiff has no need for the sand or other material, and there is no demand for it at the present time. However, considering the period of time allowed for the removal of material and the prospect of plaintiff's use or sale of some portion thereof, the fair and reasonable value of plaintiff's sand deed is the sum of $2,500.

With respect to the remaining items set forth in the table above (totaling $147,325), the parties have agreed that if judgments are rendered in behalf of such claimants and the [fol. 502] judgments are reduced by the amount of the payments previously made by plaintiff, it is entitled to credit therefor.

The second group of claims in this category consists of the following:

Organization expense	$1,836.33
Capital stock expense	945.55
Unamortized debt discount and expense	33,020.00
Miscellaneous general administration expense	35,127.21
Total	70,929.09

Plaintiff's organization expense consists of $1,201 spent for United States documentary tax stamps on 11,000 shares of its capital stock and the sum of $626.33 expended in connection with its organization as a corporation under the laws of Arkansas. Under the uniform system of accounts of the Federal Power Commission, these items are properly chargeable to organization expense, but the defendant contends that they do not constitute proper items of damage in this action.

The item of $945.55, also disputed by the defendant, represents plaintiff's share of the cost of printing a brief and other documents filed by plaintiff in the Court of Appeals on the appeal from the SEC order in the equity proceedings.

In order to obtain the approval of the Arkansas Public Service Commission for the approval of plaintiff's bond issue and bank loans, plaintiff paid the State a fee of $33,000, plus $20 for certified copies required by the financial institutions which provided plaintiff's debt financing. Plaintiff's efforts to obtain a refund of the fee after the cancellation of the Power Contract were unsuccessful. Defendant denies that this expense is a proper item of damage.

Liability for the payment of the claim for general administrative expense in the amount of $35,127.20 is disputed to the extent of $27,500. This amount represents interest at the rate of six percent per annum that was charged to construction on the $1,100,000 paid to plaintiff by the sponsors for its capital stock. The claim is for the period from February 11, 1955, when the stock was sold, until July 11, 1955, when the Power Contract was terminated. Section 4.02 of the Power Contract states that the elements of cost included in the term "construction" shall be determined in [fol. 503] accordance with the uniform system of accounts of the Federal Power Commission and that system provides for an interest charge on equity capital during the period of construction. Section 4.02 of the intrepretative memorandum provides in part:

> In computing the Interest during Construction component of the cost of the Facilities the rate of return on equity capital is not to exceed 6%.

O. The Claim of Ebasco Services, Inc.

231. Ebasco's claim is for its services and expenses for the year 1955, its charges for the year 1954 having been paid by plaintiff and included in plaintiff's claim as shown in preceding findings. The original claim was in the amount of $589,430.76, but it has been reduced to $570,727.59, as a result of a payment of $16,000 on account by plaintiff (now included in plaintiff's claim), by various credits, audit adjustments, and a waiver. The original claim included the sum of $546,328.14 for services and expenses during the period from January through July 1955, and $43,102.62 for services and expenses from August through November 1955 in connection with activities following the termination of the Power Contract. With allowances for the adjustments and credits above referred to, there is no question regarding the accuracy of the claim. The following findings relate to those portions of the claim which are disputed by defendant.

(1) Ebasco's claim for the period from January through July 1955 is based upon its written contract with plaintiff, which became effective April 20, 1955. Prior to the execution of the contract, plaintiff submitted the contract to AEC and received its approval of Ebasco as architect-engineer on the project. The contract provided that Ebasco was to be reimbursed for its costs, except for certain costs which were to be absorbed by it, and also provided that Ebasco would receive a fixed fee of $1,800,000 to be paid as follows: 18 monthly installments of $60,000, beginning with the first full month of the contract period, 16 monthly installments of $30,000 thereafter, and the balance of the fee to be considered as retentions payable upon completion of [fol. 504] the work. In the event the contract was terminated by MVG, Ebasco was to be paid its costs and the fee earned up to and including the month in which the termination occurred "plus the proportional part of all retentions." Ebasco's claim includes a fee in the amount of $180,000, which defendant contends is excessive and unreasonable.

Under the terms of its contract with plaintiff, Ebasco is due a fee of $180,000 for its services during May, June, and July 1955. The portion of Ebasco's fee that was retained was $160,000, which is 8.89 percent of the total fee

payable, or 9.75 percent of the aggregate of the monthly payments. The proportional part of the retention that is applicable to the $180,000 of accrued monthly payments is 9.75 percent or $17,560. However, Ebasco has made no claim for the proportional part of the retentions. Ebasco absorbed $106,162.12 of the costs it incurred under its contract with plaintiff. It also expended $2,200 in preparing material which plaintiff submitted to AEC in justification of the employment of Ebasco. Since the fee payments did not begin under the contract at the time Ebasco started working for MVG, the accumulated payments were lower in proportion to the total fee than the percentage of services rendered at that time by Ebasco to the total services required. The record as a whole establishes that the fee claimed by Ebasco is fair and reasonable.

(2) After the termination of the Power Contract, an AEC staff auditor tabulated certain salary payments which the defendant claims Ebasco was obligated to absorb under the terms of the MVG-Ebasco contract. The payments include the sum of $3,239.15 which the auditor listed under the heading of "Construction Management", $115.28 listed under the heading of "Insurance Department", and $3,661.42 listed under the heading of "Washington Office."

Sections V (h) and (k) of the MVG-Ebasco contract required Ebasco to absorb the costs of the services of its New York office construction staff and the services of a construction manager, who was to organize the field office staff and exercise general supervision over the project. The evidence does not show that Ebasco was not required by its contract to absorb the $3,239.15 paid for such services.

[fol. 505] Under its contract, Ebasco was required to absorb the services of its New York insurance personnel in connection with all insurance coverages relating to the work, but the evidence shows that the $115.28 was compensation paid to design engineers for time spent in consulting with insurance engineers for recommendation as to the location of equipment for the purpose of avoiding fire hazards. The amount was not paid to insurance engineers for handling insurance coverages.

The item of $3,661.42 represents salaries paid to Ebasco's employees in Washington, D. C. It was deducted from

Ebasco's claim by the AEC auditor on the basis of a statement made to him by an Ebasco official to the effect that part of the amount was for clerical and staff assistance rendered to the sponsors during the preparation of the April 10, 1954, proposal and that the remainder was paid to Ebasco employees during May, June, and July 1955, when they were engaged in obtaining priorities and permits from various Government agencies in connection with the construction of the plant.

The auditor made no segregation of the payments between the two types of services, but we have concluded that approximately $2,161 consists of Ebasco's charge for services rendered in connection with the preparation of the April 10 proposal and is included in the expenditures for this purpose as shown in finding 226. As to the remaining $1,500.42, which was charged for services rendered in obtaining priorities and permits from various Government agencies in connection with the construction of the plant, plaintiff has failed to establish that the cost of these charges was not to be absorbed under the terms of the contract between plaintiff and Ebasco.

(3) The defendant's AEC auditor prepared a statement of Ebasco's overhead charges for the months of May and June 1955, including $32,098.44 for May and $32,644.79 for June. These sums amounted to about 10 percent of Ebasco's overhead on all work during these months, and the defendant contends that such charges are not related to Ebasco's contract and that their elimination would reduce the claim by $16,600. Ebasco's direct and indirect costs are determined [fol. 506] mined in accordance with an accounting system submitted to and approved by the SEC. The overhead is accumulated under six general categories, and through an elaborate system of calculations, monthly rates are arrived at and apportioned to direct labor costs. The evidence shows that there is no improper allocation of overhead in Ebasco's claim with the exception of the three following accounts:

	1955 May	1955 June
Excess of termin. reserve accrual over actual...	$1,872.08	$2,622.00
Accrual for additional legal services...........	2,000.00	2,000.00
Accrual of machine accounting installation costs	1,250.00	1,550.00

Plaintiff has not proved whether these items represent true liabilities or are mere estimates. Accordingly, it is reasonable to exclude them from the overhead base used in making allocations to MVG work and such exclusion results in a reduction of approximately $960 in Ebasco's claim.

(4) Included in Ebasco's claim for the period prior to July 31, 1955, is the sum of $281.70, which represents compensation paid to Ebasco's engineers for planning the facilities and space that would be required for the accounting organization of plaintiff in the operation of the generating plant at West Memphis. Although a separate work order was issued for such work under date of May 23, 1955, the work order was for the type of engineering work required by the MVG-Ebasco contract, and the order stated that Ebasco was to be reimbursed for the costs pursuant to Section VIII of that contract.

Also included in Ebasco's claim for the period before July 31, 1955, is the sum of $8,476.67 for services paid to Ebasco's personnel for the preparation of data required by the institutional investors in connection with the bond purchase and bank credit agreements, as well as for the draft of the mortgage. The data included a preliminary estimate of the results of operating the plant and other details. The record shows that the life insurance companies which purchased plaintiff's bonds relied in part on Ebasco's report in making the commitment to buy the bonds. The services rendered were not specifically provided for in the MVG-Ebasco contract but were performed under a work order dated May 23, 1955, stating that the costs were to be re-[fol. 507] imbursed pursuant to section VII of the MVG-Ebasco contract.

Defendant contends that neither of the above items is a proper item of damage.

(5) For its services during the period from August through November 1955, Ebasco did not charge on the basis provided for in its contract with plaintiff. Ebasco considered that the contract was terminated because of the termination of the Power Contract. Therefore, Ebasco billed plaintiff for the services of designers and draftsmen at twice their rate of compensation and for the services of engineers and other technical personnel at $2\frac{1}{2}$ times their rate of compensation, plus social security taxes. These were

the customary per diem rates charged by Ebasco. The total charge includes $35,666.31 for personal services and $7,393.74 for out-of-pocket expenses. Defendant contends that since the MVG-Ebasco contract provided that Ebasco's overhead would be limited to a charge of 65 percent of total salary compensation, the above claim should not exceed the sum of $35,120.65. However, had Ebasco rendered bills to plaintiff in accordance with the terms of its contract after July 31, 1955, Ebasco would have been entitled to receive the monthly installments of its fee, plus a proportion of the retained fee, plus its expenses and overhead, less the costs it was required to absorb under the language of the contract. The evidence shows that the amount claimed is fair and reasonable.

(6) Ebasco's claim includes a relatively small amount for the services of its engineers in preparing for and testifying at the hearings held before the SEC and the Arkansas Public Service Commission in 1955 in connection with plaintiff's applications to those agencies. The records in evidence do not establish the amount charged for such purposes in 1955.

(7) When plaintiff notified Ebasco on July 1, 1955, to terminate work on the project, Ebasco did so as expeditiously as possible. However, in view of AEC's failure to give plaintiff instructions on post-termination activities and the possibility that Ebasco might be required to continue with the work, it completed the partially finished design [fol. 508] drawings of the plant. Ebasco has retained the original tracings, one copy of each drawing, copies of engineering studies on the project, and copies of various specifications it prepared. The defendant contends that these records are of value to Ebasco and that the claim should be reduced by an amount equal to 10 percent of the cost of Ebasco's preliminary and design-engineering from July 1, 1954, through July 1, 1955. The evidence does not establish that the drawings, studies, or specifications would be used by Ebasco on any other jobs, that they would be used for reference purposes, or that they have any value to Ebasco.

P. The Claims of Cahill-Gordon, Winthrop-Stimson, Willkie-Owen, and Milbank-Tweed

232. The petition includes claims in behalf of four other New York City law firms. They are Cahill, Gordon, Reindel & Ohl (hereinafter called Cahill-Gordon), Winthrop, Stimson, Putnam & Roberts (hereinafter called Winthrop-Stimson), Willkie, Owen, Farr, Gallagher & Walton (hereinafter called Willkie-Owen), and Milbank, Tweed, Hope & Hadley (hereinafter called Milbank-Tweed).

Since Cahill-Gordon and Winthrop-Stimson both represented plaintiff and since other pertinent facts are applicable to the claims of each of the four firms, the claims will be considered together.

(a) The Claim of Cahill, Gordon, Reindel & Ohl

233. The claim of this law firm is in the amount of $246,198.76. It covers a period from February 22, 1954 through November 29, 1955. Of the amount claimed, $235,000 is for services rendered, and $11,198.76 is for out-of-pocket disbursements in connection with such services. Plaintiff has paid $11,000 of such disbursements, leaving a net claim of $235,198.76.

234. Cahill-Gordon is and has been general counsel for Middle South and for MVG since it was incorporated on July 19, 1954. Before that date and commencing on February 22, 1954, the firm rendered services and gave advice in connection with various matters for the account and [fol. 509] benefit of the proposed new corporation that was later organized as MVG.

The services of the firm were rendered in close cooperation with Winthrop-Stimson, general counsel for Southern. The services of Cahill-Gordon are fully described in plaintiff's exhibit 109 and defendant's exhibit 259. The following is a summary of the principal services performed by the firm during the four periods mentioned below:

(1) February 22 through April 10, 1954

Beginning on February 22, 1954, the firm assisted in drafting the sponsors' proposal of February 25, 1954, and considered various legal problems that the project would create

with respect to Middle South and Southern, and the relationships among the companies in their systems and with MVG. The first proposal was prepared and submitted under great pressure, because of the insistence of the Budget Bureau on the need for speed. Cahill-Gordon participated in the review of the first proposal, and assisted in the drafting of the proposal of April 10, 1954. In the period between the two proposals, the attorneys conferred with representatives of the sponsors and the companies in their systems in an effort to work out appropriate intercompany relationships.

The hours of work spent by Cahill-Gordon on the above-described matters during the first period amount to 155.

(2) April 11 through June 24, 1954

In the three months' interval after the filing of the April 10 proposal, Cahill-Gordon worked on and gave attention to proposed amendments to the Atomic Energy Act, to preliminary matters relating to the organization and incorporation of MVG, and to the various Federal and State regulatory proceedings that would have to be conducted in the event a contract was entered into with the Government. The firm also reviewed AEC's contracts with EEI and OVEC, and thereafter prepared the first draft of the proposed power contract, proofs of which were distributed to the sponsors. These activities required 152 hours of work by claimant during the interim period.

[fol. 510] (3) July 3 through November 11, 1954

The proof of the Power Contract prepared by Cahill-Gordon formed the basis for the first negotiation session held with AEC on July 7, 1954. Thereafter, the Cahill-Gordon partner in charge of the work on the project attended 17 sessions at the AEC office in Washington, D. C. and presided over the MVG group during the meetings with AEC. The negotiations were arduous because of the complexity of the subject matter, the various changes proposed by the defendant from time to time, amendments to the Atomic Energy Act during the same period, the great public interest in the project, and the criticism and attacks

directed against it. The partner in charge had to do this work away from his home office. The daily sessions often lasted for 10 hours or more, and the attorney worked many nights and on Sundays.

While the contract was being negotiated, an attorney from the firm attended sessions of the Joint Committee on Atomic Energy and helped MVG officers prepare for public hearings, although they were not called to testify.

Cahill-Gordon also participated in the revision of the draft of the interim power agreement, prepared by Winthrop-Stimson. This work culminated in the letter agreement of November 11, 1954.

During the same period, Cahill-Gordon began work in New York on the stock financing documents and prepared a draft of an application to SEC, requesting authority for the issuance and sale of plaintiff's stock. As previously stated, the application was filed in SEC on November 17, 1954.

As early as May 1954, Cahill-Gordon conferred with plaintiff and its financial agents regarding plaintiff's debt financing and studied the memorandum outlining the basic terms of the proposed financing. In August and September, Cahill-Gordon prepared the first drafts of the bond purchase agreement, including the mortgage, and the bank credit agreement. The bond purchase agreement, when completed, was a document of 15 printed pages with an attached intercompany agreement of 7 pages, and a mortgage of 187 printed pages. The bank credit agreement contained 16 [fol. 511] printed pages and had attached thereto various documents, including a form of note and a form of an opinion to be given by the counsel for the banks. Although Cahill-Gordon was assisted in this work by the opinions and suggestions of other counsel, the firm retained primary responsibility for the drafting of the financing documents and for clearing changes and additions thereto.

The firm also devoted some time to the preparation and revision of the articles of incorporation and bylaws of MVG.

During the period stated, the firm's records show that it spent 1095.50 hours on the various matters outlined above.

(4) November 11, 1954 through July 10, 1955

During this period, the firm devoted a total of 3,486.25 hours to a variety of matters, including MVG's stock financing, purchase of MVG stock by Middle South, bond financing, bank financing, and regulatory approvals related to these matters.

The application relating to MVG's stock was vigorously contested in the SEC by the State of Tennessee and the Light, Gas and Water Division of the City of Memphis. Cahill-Gordon, with Winthrop-Stimson, prepared an answer to the motion of the State of Tennessee, *et al.*, to intervene in the proceedings, participated as counsel in the SEC hearings, and filed proposed findings of fact and a reply brief. The Cahill-Gordon partner presented oral argument on behalf of MVG and Middle South. After the SEC order was appealed to the United States Court of Appeals for the District of Columbia, the two firms filed a petition to intervene on behalf of Middle South and Southern, a motion to dismiss the petition for review, an answer, a brief and reply brief. They also argued the question on the merits and, after the case was remanded to SEC because of the termination of the Power Contract, the two firms filed in the SEC an amendment to the application, calling attention to the termination of the Power Contract.

During this same period, the firm completed the drafting and negotiation of the various documents required in connection with MVG's bond and bank financing. The work [fol. 512] was difficult and time-consuming because of the complexity of the documents and the fact that the positions of the secured and unsecured creditors were more opposed than in the usual situation. As already stated, both sets of lending documents were signed in April 1955. Negotiation was delayed and rendered more difficult because of the recapture provision in section 7.09 of the Power Contract, which was not agreed upon until near the end of the negotiations between AEC and MVG. The firm was called upon to prepare and submit to the lenders legal opinions as to the validity of the bond purchase and bank credit agreements, the Power Contract, and the intercompany agreement.

Cahill-Gordon also drafted the back-up and surplus

power agreement required by section 2.02 of the contract and had it in final form at the time the contract was cancelled by the defendant.

In connection with the approvals required to be obtained from the Arkansas Public Service Commission, Cahill-Gordon cleared with local attorneys as to the content of the documents filed in Arkansas and had a senior associate present at the hearings in that State.

Cahill-Gordon, with the assistance of Winthrop-Stimson, prepared the application filed in SEC for authorization of plaintiff's debt financing and participated in the SEC hearings in which MVG was opposed by the same parties who intervened in the equity proceedings. The two law firms filed a brief, proposed findings of fact and conclusions, but before any action was taken by SEC, the Power Contract was terminated.

Other activities in which representatives of the firm were engaged during this period consisted of advice given to plaintiff regarding the retention of Ebasco as architect-engineer, the filing of applications with the Federal Power Commission on behalf of officers of MVG and Middle South, and legal services related to the laying of the transmission lines of the MVG plant across the Mississippi River.

(5) July 12, 1955 through November 29, 1955

After the defendant gave notice that the contract would be terminated, the firm assisted MVG with the grave legal [fol. 513] and practical problems arising out of its commitments and obligations for the projected power plant. Cahill-Gordon gave advice and assistance regarding arrangements for terminating the various purchase orders and subcontracts at the least possible cost, attended conferences with AEC in an effort to agree upon cancellation costs, rendering an opinion upon the conflict of interest question raised by the AEC, and counseled MVG on how to mitigate the damages sustained by various claimants.

Cahill-Gordon, with the assistance of Winthrop-Stimson, also prepared and filed the petition in this court. Of the total of 623.25 hours of service recorded by Cahill-Gordon during this period, approximately 63½ hours were devoted to the preparation of the plaintiff's petition in this case and to other work directly related thereto.

The records of Cahill-Gordon show recorded time of 5,512 hours in performing the services covered by its claim. Approximately 40 percent of this total were hours spent by partners and 60 percent were hours spent by associates, principally senior associates. Although the services were not charged for on an hourly basis, Cahill-Gordon's average hourly charge amounted to $42.63.

Under a tentative arrangement made for bookkeeping purposes, the hours devoted to services rendered were charged to five separate accounts. The distribution of such hours among the several accounts throughout the five periods referred to above is shown in the following table:

[fol. 514]

Accounts	Hours of services by periods					
	Feb. 22 through Apr. 10, 1954	Apr. 11 through June 24, 1954	July 3 through Nov. 11, 1954	Nov. 11, 1954, through July 10, 1955	July 12 through Nov. 29, 1955	Total
MVG General	155	116.25	882.00	448.25	617.50	2,219.00
Bond financing	...	35.75	166.25	822.50	2.50	1,027.00
Common stock financing	...	......	7.25	1,069.00	.50	1,076.75
Middle South stock financing	...	......	......	678.00	.25	678.25
Bank financing	...	......	40.00	468.50	2.50	511.00
Total	155	152.00	1,095.50	3,486.25	623.25	5,512.00

[fol. 515] While an exact computation cannot be made, a reasonably correct determination shows that the amount claimed in behalf of Cahill-Gordon includes $2,707.01 for preparing the petition in this case.

235. Sometime prior to the execution of the Power Contract, there was a tentative understanding among plaintiff, the sponsors, Cahill-Gordon, and Winthrop-Stimson that a portion of the charges for the services of the two law firms would be paid for by the sponsors on the theory that they would have an investment in MVG and that the investment would be of value to them. The result of this temporary arrangement would have been to allocate approximately 24 percent of Cahill-Gordon's charges to Middle South, and 40 percent of Winthrop-Stimson's charges to Southern. The understanding was reached at a time when there was no thought that defendant would terminate the Power Contract. After the sponsors' investment had been converted from an apparent asset to a liability by the cancellation of that contract, the temporary arrangement was abandoned and the total charges claimed by the two firms in this action were charged to plaintiff on the premise that all of such legal services had been rendered in aid of enabling MVG to obtain and carry out the Power Contract and, therefore, that the expenses should be borne by plaintiff. The sponsors also considered that this action was proper because of their opinion that the provisions of section 7.07 of the Power Contract contemplated that they would be made whole if the contract was cancelled.

(b) The Claim of Winthrop, Stimson, Putnam & Roberts

236. The claim of this law firm is for $108,128.67. It covers the period from February 5, 1954 through November 29, 1955, in which there were 2,785.43 hours of service charged on the firm's books. Of the amount claimed, $104,000 is for service rendered, and $4,128.67 is for out-of-pocket expenses. Plaintiff has paid $4,000 of these expenses, thereby reducing the net claim of the firm to the sum of $104,128.67. Winthrop-Stimson has been counsel for Southern for many years and joined with Cahill-Gordon in representing plaintiff.

[fol. 516] A complete statement of the nature of the services rendered by Winthrop-Stimson during the time perti-

nent to the claim appears in plaintiff's exhibit 110 and defendant's exhibit 260. As stated, Winthrop-Stimson participated with Cahill-Gordon in rendering the services described in finding 234 (1-5). Therefore, except as otherwise indicated by the context, the facts set forth in finding 234 (1-5) and finding 235 are applicable to the claim of Winthrop-Stimson. In addition, Winthrop-Stimson prepared the initial draft of the intercompany agreement, prepared and furnished to AEC an opinion showing that Southern and its subsidiaries were authorized to engage in the undertakings required by the Power Contract, performed extensive research regarding the effect of the Public Utility Holding Act of 1935 on the arrangements contemplated by the Power Contract, and dealt exhaustively with one of the legal problems presented in the SEC proceedings, namely, a showing that MVG's plant was capable of economical and efficient operation as a part of Southern's integrated system within the standards of the Public Utility Holding Act. Although Cahill-Gordon prepared the first drafts of many of the documents described in finding 234, Winthrop-Stimson not only reviewed the drafts but did research on the legal questions involved, submitted memoranda pertaining thereto, and prepared appropriate revisions to be incorporated in the final drafts of such documents.

237. The records of Winthrop-Stimson show recorded time of 2,785.43 hours for the period covered by its claim. Of the total hours of service, 1,503.59 hours were spent by partners and 1,281.84 were spent by associates. The average charge per hour was $37.82.

The following table shows the six classifications to which the services were charged during the periods stated:

[fol. 517]

Classifications	Hours of services by periods				
	Feb. 5 to June 30, 1954	July 2 to Nov. 10, 1954	Nov. 11, 1954, to July 11, 1955	July 12 to Nov. 29, 1955	Total hours
Southern Co., general Re: MVG	203.25	453.75	18.00	......	675.00
SEC hearings	......	167.25	824.75	......	992.00
Appeal from SEC order	......	......	382.18	8.75	390.93
Debt financing	......	......	366.00	......	366.00
Power contract	......	......	14.00	......	14.00
Termination of power contract	......	......	......	347.50	347.50
Total hours by periods	203.25	621.00	1,604.93	356.25	2,785.43

[fol. 518] During the first period covered by the foregoing table, Winthrop-Stimson spent 15 hours in the preparation of a proposal, which was submitted by Southern to TVA on February 9, 1954.

In November 1955, the firm devoted approximately 7 hours in assisting Cahill-Gordon in the preparation of the petition filed in this suit.

238. There was some duplication in the services rendered by Cahill-Gordon and by Winthrop-Stimson during the period covered by the claims of the two firms. Since the proposed power plant involved relationships among MVG, Southern, and the subsidiaries of the Southern system, Southern requested that its counsel, Winthrop-Stimson, participate with Cahill-Gordon in the joint enterprise of the sponsors. It was defendant's wish that more than one sponsoring company participate in the proposal. In view of the intercompany arrangements contemplated by the Power Contract, the obligations assumed by Southern and its subsidiaries, and the magnitude and complexity of the resulting legal problems, Southern's request was reasonable. Moreover, in view of its acquaintance and relationship with Southern and its subsidiaries, Winthrop-Stimson was in the best position to facilitate the power arrangements between MVG and Southern's subsidiaries.

Although records are not available for exact computations, a reasonably correct determination shows that the amount claimed in behalf of Winthrop-Stimson includes \$567.30 for 15 hours spent in preparing a proposal from Southern to TVA, and the sum of \$264.74 for 7 hours spent in drafting plaintiff's petition.

(c) The Claim of Willkie, Owen, Farr, Gallagher & Walton

239. The claim of this law firm is in the amount of \$75,787.85, of which \$75,000, is for services rendered, and \$787.85 is for disbursements. The firm was retained on or about August 16, 1954, to act as special counsel for the Metropolitan Life Insurance Company and New York Life Insurance Company in connection with their respective commitments to purchase an aggregate principal amount of not to exceed \$92,914,000 of plaintiff's first mortgage bonds. By [fol. 519] the terms of section 9.06 of the bond purchase

agreement, plaintiff became obligated to pay the reasonable fees and disbursements of Willkie-Owen, whether or not the transactions contemplated in the agreements were consummated.

240. A complete statement of Willkie-Owen's services appears in plaintiff's exhibit 107 and defendant's exhibit 257. The following is a summary of the matters set forth in the exhibits:

Since the Power Contract was to be assigned as security for the payment of bonds, Willkie-Owen studied the memoranda describing plaintiff's proposed debt financing and examined all aspects of the Power Contract, including the provisions of the Atomic Energy Act of 1954 and the action to be taken by certain governmental agencies pursuant to the terms of the Power Contract. This was done in August 1954 in order to advise the insurance companies of the basic problems involved in the financing. During September, October, and early November, Willkie-Owen examined and revised the drafts of the proposed bond purchase agreements, the subscription agreements, the intercompany agreement, and the mortgage and deed of trust. The firm's progress on these matters was directly affected by the negotiation of the Power Contract and particularly by the inclusion in the final draft of that contract of a provision giving the Government the right to recapture the power plant and other facilities. This development was of particular concern to the bond purchasers and much time was required in working out a solution that was satisfactory.

In the interest of the bond purchasers, Willkie-Owen studied the reported proceedings of the Joint Committee on Atomic Energy and the subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.

In December 1954, the firm prepared for the bond purchasers a list of 34 substantive matters disclosed by a review of the financing documents and the Power Contract. After extended discussion, agreement was achieved between plaintiff and the bond purchasers on these and additional matters.

Willkie-Owen gave attention to the SEC hearings, particularly to the position taken by the State of Tennessee and others regarding the validity of the Power Contract.

[fol. 520] During January and February 1955, Willkie-Owen attended conferences between plaintiff and the bond purchasers, as a result of which a business understanding was reached. Thereafter, the firm began a detailed step-by-step revision of the bond purchase agreements, the inter-company agreement, and the mortgage. From February 15 to March 24, 1955, the law firm worked under continuous pressure in order to get the financing documents in final f[illegible] as soon as possible and thus enable plaintiff to file its ap[illegible]cation for SEC approval of the debt financing.

From February 1, 1955, until the bond purchase agreements were signed on April 21, 1955, Willkie-Owen devoted a substantial amount of time in determining whether and to what extent the interests of the bond purchasers were affected by the resolution of rescission of the Joint Committee on Atomic Energy, by a letter from the Chairman of the Joint Committee to the effect that the bonds were not legal investments, and by the appeal from the SEC equity proceedings.

Willkie-Owen reviewed plaintiff's application for SEC approval of the debt financing and advised the officials of the insurance companies regarding the testimony to be given by them in that proceeding. Late in June 1955, the firm rendered a formal opinion on new legal questions raised by one of the bond purchasers.

After June 1955, the firm's services were largely devoted to reviewing the SEC proceedings relating to plaintiff's debt financing and to the consideration of questions raised by the cancellation of the Power Contract. At the time of borrowing under the bank credit agreement and at the first closing of the bond purchase agreement, Willkie-Owen would have been required to render opinions covering almost every phase of the transaction in which the bond purchasers were interested. Since the Power contract was cancelled, Willkie-Owen was never in fact called upon to submit these opinions, but the form and substance had to be agreed upon and the exact language had to be prepared and attached to the bond purchase agreements. Therefore, the firm had to make a complete examination of the legal questions involved before the execution of the bond purchase agreements in order to determine whether or not the

[fol. 521] firm could give the opinions required by the bond purchasers.

In performing the legal services described, a total of 1,792¾ hours were spent by Willkie-Owen, of which 837¾ hours were spent by partners, and 955 hours were spent by associates. The records of the firm show that the time was spent as follows: 335 hours between August 16 and November 11, 1954, when the Power Contract was signed; 1,185¾ hours from November 11, 1954 to April 21, 1955, when the bond purchase agreements were signed; 252½ hours between that date and July 11, 1955, when the Power Contract was cancelled, and 19½ hours thereafter. Of the total time spent, 1,753¾ hours were devoted to the bond purchase agreements, 29 hours to the SEC hearings, and 10 hours to other matters. The average hourly charge for Willkie-Owen's services was $41.84.

(d) The Claim of Milbank, Tweed, Hope & Hadley

241. The claim of this law firm is in the amount of $15,000 for services rendered over a period of 15 months, from August 10, 1954 to December 5, 1955. The firm was retained as special counsel for The Chase Manhattan Bank and 23 other participating banks in connection with the commitments of the banks to lend plaintiff up to $27,086,000, pursuant to a bank credit agreement dated and executed, April 21, 1955. Under section 9.04 of the agreement, plaintiff became obligated to pay the reasonable fees and disbursements of Milbank-Tweed whether or not the transactions contemplated were consummated.

242. A complete description of the services rendered by Milbank-Tweed is contained in plaintiff's exhibit 108 and defendant's exhibit 258. The principal services rendered were:

(1) Participation in the drafting and negotiation of the bank credit agreement and the related intercompany agreement, including attendance at the numerous conferences incident thereto.

(2) Study and analysis of the Power Contract and related documents, the bond purchase agreement, and the [fol. 522] mortgage securing the bonds, and advice to the

banks concerning the validity and enforceability of these documents.

(3) The drafting of instruments evidencing the corporate proceedings required to authorize the bank loans, and the preparation of an opinion to be furnished by the firm pursuant to the bank credit agreement.

(4) Consultation with plaintiff regarding the proceedings before SEC and the Arkansas Public Service Commission.

(5) Advice to the banks concerning the legal questions raised by the cancellation of the Power Contract and the rescission by SEC of the order authorizing the issuance and sale of plaintiff's stock.

(6) The negotiation and drafting of an agreement terminating the banks' commitments to plaintiff.

In performing these services, a total of 465½ hours were spent by the firm, of which 70 were spent by a senior partner, 367 by a senior associate, and 28 by other partners and associates. Of this time, 103¾ hours are recorded as having been spent between August 10 and November 11, 1954, the date of signing of the power contract; 248¼ hours between that date and April 21, 1955, the date of the bank credit agreement; 74 hours between that date and July 11, 1955, the date of cancellation of the power contract; and 39½ hours subsequent to that date. All time recorded on the firm's books was charged to one account entitled "Re: MVG Co.". The average charge per hour for the firm's services was $32.19.

(e) Reasonableness of the Attorneys' Fees

243. Three eminent members of the New York bar who are senior partners of firms of standing, experience, and size comparable to the four firms asserting claims in this suit were called as witnesses by plaintiff. The three expert witnesses testified that the fee claimed by each of the four firms is fair, reasonable, and in line with fees that would have been charged by comparable firms in New York City for similar work. No testimony to the contrary was adduced by defendant.

244. In addition to the facts which have been set forth in the preceding findings, the following facts are pertinent to

[fol. 523] the reasonableness of the fees charged by the four law firms:

(1) While attorney's fees for the type of services rendered are not determined by multiplying the hours spent by some fixed rate, the time devoted to the work and the division of time between partners and associates are factors of importance. The average attorney in one of these firms records about 1,500 chargeable hours a year. The time devoted by each firm to the services rendered was approximately equivalent to the uninterrupted services of one man for the following periods of time:

Firm	Total period of services	Equivalent time for one man
Cahill-Gordon	21 months	44 months
Winthrop-Stimson	22½ months	22⅓ months
Willkie-Owen	17 months	14⅓ months
Milbank-Tweed	17 months	3¾ months

At the time the services were performed, the salaries paid to associates in such firms varied from $4,500 per annum for juniors to $20,000 per annum for senior associates; the latter figure includes bonuses. Not less than one-half of the gross receipts of each law firm was required for the payment of overhead, including the salaries of associates.

(2) The total fees charged by the four firms, equated to an hourly basis, averaged less than $40 per hour. At the time the services were rendered, the fees charged represented the "going" rates in New York City for legal services of the kind involved here.

(3) In the transactions in which the attorneys were employed, five major private interests were involved—the plaintiff, the 2 sponsors, 2 insurance companies, and 24 banks. At least four agencies of the Federal Government, two States, and two cities had a definitive interest in the matter. In addition, the work of the attorneys was affected by the activities of several congressional committees.

(4) Approximately 120 million dollars in financial commitments were involved. There is no fixed ratio between the amount of money in a transaction and the fees charged for legal services rendered in connection therewith. Also, the percentage of fees to the amount of the securities generally diminishes as the sum of the securities is increased. However, the amount of money in the transactions with

[fol. 524] which the four firms were concerned was a substantial sum and the percentage of their fees to that sum is in line with fees charged by other New York attorneys in similar cases.

(5) The partners from the four firms are lawyers of wide experience and demonstrated ability in the respective fields of specialization; each has a good reputation and a high standing in his profession. The associates who worked with them were competent for the tasks assigned to them. Each of the attorneys displayed a high degree of professional competence.

(6) The services of the attorneys, particularly those of Cahill-Gordon and Winthrop-Stimson, were rendered under considerable strain and pressure. In the beginning, the defendant announced that the power from the proposed plant would be needed by the fall of 1957. The negotiation of the contract was conducted against a moving target in that the bill, which became the Atomic Energy Act of 1954, was under consideration by Congress during a substantial part of the negotiating period. Some of the provisions in and amendments to the bill had a direct bearing upon the kind of contract which could be entered into. The Power Contract was the object of great public interest, and it was necessary for the attorneys to consider almost every provision of the contract in light of the criticism and attacks directed against the project. Near the end of the negotiations, a difficult question from the standpoint of the four law firms was presented by AEC's insistence upon the inclusion of the recapture provision in the Power Contract. The factor of strain and pressure continued to some extent after the execution of the Power Contract because of the vigorous opposition encountered by the attorneys' clients in the SEC equity and debt financing proceedings and the delay which resulted therefrom.

245. In view of the character, scope, and complexity of the work performed by the attorneys, the time they devoted to the work, the legal experience and the skill required, the circumstances under which the services were rendered, and the contributions made by the four firms to the solution of the many problems presented to them, the fees charged by them and claimed in this action are fair and reasonable.

[fol. 525] Q. POST-PETITION CLAIMS

246. In paragraphs 19 and 22 of the petition, plaintiff alleged that:

> The plaintiff will also incur additional expenses prior to the satisfaction of the judgment herein, the amount of which will be supplied by amendment hereto.

With respect to the post-petition claims, the parties have stipulated that the trial be limited to the issue of plaintiff's right to recover, with the determination of the amount of recovery, if any, reserved for further proceedings. In order to expedite the presentation of this issue to the court, the parties have agreed upon the general nature of such expenses, without prejudice to defendant's right, among others, to contest the actual incurrence of the expenses and performance of the services, if it is held that plaintiff is entitled to recover for them.

The names of post-petition claimants and a statement of the general nature of services performed or expenses incurred by them follow:

(a) *Ebasco* rendered services between December 1955 and February 1956 incident to the termination and settlement of commitments under its contract with plaintiff, including closing out purchase orders, disposing of surplus equipment, and maintaining construction accounting records. From December 1956 through October 1957 Ebasco also rendered services in examining data and records in support of the petition, and testifying at the trial. Finally, Ebasco made certain nonservice expenditures for plaintiff, including various forms of automobile insurance, and workmen's compensation, public liability and property damage insurance.

(b) *Cahill-Gordon* rendered services and made disbursements in connection with the trail of this case, including factual and legal research in preparation for the trial and the conduct of the trial itself. It also rendered services in connection with the claims of the use-plaintiffs and in connection with the termination of the Power Contract.

(c) *Winthrop-Stimson* also rendered services and made disbursements, in connection with the trial of this case. In addition to legal and factual research in preparation for

trial, it prepared its own claim and that of Southern, and [fol. 526] conferred with Government representatives with respect thereto, and testified in support of its own claim for services. Its representatives were also present during the trial of the case.

(d) *Mississippi Valley Generating Company* made disbursements or incurred costs subsequent to the filing of the petition, including costs relating to (1) the sale of fixed assets, (2) the reproduction of documents, (3) freight, (4) insurance, (5) telephone calls, (6) printing the pleadings, (7) travel, and (8) reporting certain testimony.

(e) In addition to the foregoing, claims are asserted on behalf of Ebasco; Cahill-Gordon; Winthrop-Stimson; plaintiff; Milbank-Tweed; Willkie-Owen; Middle South; and Southern, for "compensation for the loss of the use of their money represented by their respective claims".

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of one million eight hundred sixty-seven thousand five hundred forty-five dollars and fifty-six cents ($1,867,545.56), said sum representing that amount found to be due the plaintiff on a portion of its claim. The amount of recovery on the remaining portion of the claim will be determined in further proceedings pursuant to Rule 38(c).

[fols. 527-528] PROCEEDINGS FOLLOWING OPINION OF THE COURT

On August 14, 1959, the defendant filed a motion for new trial.

On October 7, 1959, the court entered the following order on said motion:

Order

These cases come before the court on motions for rehearings, amendment of judgments or new trials under

Rules 53 or 54 of the Rules of this court, and on consideration thereof,

It is Ordered this seventh day of October, 1959, that said motions be and the same are overruled as follows:

* * * * * * *

479-55. Mississippi Valley Generating Co., Defendant's motion

* * * * * * *

By the Court, /s/ Marvin Jones, Chief Judge.

[fol. 529] Clerk's Certificate Omitted in Printing

[fol. 530] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No.

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 5, 1960

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 19th, 1960.

Earl Warren, Chief Justice of the United States.

Dated this 5th day of January, 1960.

[fol. 531] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 650

UNITED STATES, Petitioner,

vs.

MISSISSIPPI VALLEY GENERATING CO., ETC.

ORDER ALLOWING CERTIORARI.—April 4, 1960.

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

April 4, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 [illegible] [illegible]

No. ~~550~~ 26

In the Supreme Court of the United States

OCTOBER TERM, 1959

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. LEE RANKIN,
Solicitor General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
SAMUEL D. SLADE,
HOWARD E. SHAPIRO,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

CITATIONS

536830—60——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case on July 15, 1959.

OPINION BELOW

The opinions in the Court of Claims are reported at 175 F. Supp. 505. They are set forth in the Appendix, *infra*.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1959 (App., *infra*, pp. 70, 268). A timely motion for a new trial was denied on October 7, 1959 (R. 527). By an order dated January 5, 1960, the Chief Justice extended the time for petitioning for certiorari to and including January 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

A contract between the Government and the respondent resulted from a proposal developed in negotiations between the Government and the business entity which organized respondent. One of the significant persons transacting business for the Government with that business entity during these negotiations had, through a probable subcontractor under the proposed contract, an indirect financial interest in the contract, which was known to his superior officers in the Government. The ultimate question presented is whether the contract is a valid obligation and enforceable against the United States.

STATUTE INVOLVED

18 U.S.C. 434 provides as follows:

> Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

STATEMENT

This is a suit against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, by respondent, an Arkansas corporation (F. 1; App., *infra*, p. 87)[1], to recover on behalf of itself, and

[1] "F.—" refers to the findings of fact by the Court of Claims, Appendix, *infra*, pp. 86–268.

for the use of twenty-four other parties, certain termination costs and damages which it claims under a Government contract (R. 14–70) to deliver electric power to the Atomic Energy Commission (AEC) (F. 2, App., *infra*, p. 87). The contract was signed November 11, 1954 (F. 3(c), App., *infra*, p. 88) and became effective December 17, 1954 (F. 8, App., *infra*, p. 90). On August 1, 1955, respondent was advised by a letter from the Chairman of the AEC that the President of the United States had ordered termination of the contract because the Government no longer required the power (F. 19, App., *infra*, p. 94). Termination discussions between the AEC and respondent were broken off the following October; on November 23, 1955, the AEC wrote respondent that "upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government" (F. 20, App., *infra*, p. 94). This conclusion was based upon a review by AEC's General Counsel of the role which Adolphe H. Wenzell, a consultant to the Bureau of the Budget, had played in the development of the offer which formed the basis of the contract (F. 128, App., *infra*, p. 157).

The pertinent facts found by the Court of Claims are as follows:[2]

I

THE CONTRACT

A. THE PURPOSE OF THE CONTRACT

The purpose of the contract was to provide addi-

[2] We do not challenge the court's findings of fact.

tional electric power for the area around Memphis, Tennessee. The Tennessee Valley Authority anticipated a power shortage in the Memphis area, which it served. The Authority's existing capacity was fully committed; in part, this full commitment derived from its heavy obligation to furnish power to AEC's facilities in the Tennessee Valley region (F. 36, App., *infra*, pp. 102–103). To meet the expanding demand in the Memphis area, the Authority wished to increase its existing power production facilities by constructing a steam-operated generating plant at Fulton, ~~Missouri~~ Tenn (F. 36, App., *infra*, pp. 102–103).

To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, App., *infra*, pp. 95, 102–103). The Commission had such an arrangement with the Ohio Valley Electric Corporation for its facility at Portsmouth, Ohio (F. 27, App., *infra*, p. 97); a plant was also under construction by Electric Energy, Inc., headed by James W. McAfee, to furnish some power to AEC's plant at Paducah, Ky. (F. 37, App., *infra*, p. 103).

On December 2, 1953, Joseph M. Dodge, then Director of the Bureau of the Budget, asked the AEC whether further expenditures for TVA could be avoided by having AEC contract for 450,000 kw of private power for its Paducah plant and then release a like amount to TVA (F. 37, App., *infra*, p. 103). The Commission put the question to McAfee, who is

also President of Union Electric Company (F. 37, App. *infra*, p. 103). McAfee advised that he believed a private group could be formed to construct such a plant (F. 37, App., *infra*, p. 104). He notified another utility executive, Edgar H. Dixon, the head of Middle South Utilities, Inc., and on December 23, 1953, Dixon came to Washington to discuss the matter with the AEC (F. 39, App., *infra*, p. 105).

On the basis of the advice from McAfee, the Bureau of the Budget concluded that the AEC could arrange for private power to meet its needs. Accordingly, a statement was drafted for inclusion in the President's Budget Message to be delivered to Congress on January 21, 1954, to the effect that arrangements were being made to relieve TVA's commitments to the AEC and to make available an equivalent amount of power for the use of other TVA consumers (F. 41, App., *infra*, p. 106).

B. DEVELOPMENT OF A FIRM PROPOSAL FROM THE PRIVATE UTILITIES

Dixon and McAfee had suggested that the Government's power problem could be solved if either the City of Memphis or TVA entered into a contract with private utilities to construct a plant in the Memphis area (Fs. 39, 42, App., *infra*, pp. 105, 107). Objections to having the AEC contract for additional power at Paducah were discussed between AEC and the Bureau of the Budget in January 1954, and AEC was asked by the Budget Bureau to explore the matter further with the utility executives (F. 43, App., *infra*, p. 108).

The Commission's staff met with Dixon and McAfee on January 20, 1954, and after discussions both

in the Commission and in the Bureau of the Budget, the Government requested the utility company executives to consider the construction of a power plant to deliver power to AEC at Memphis, instead of at Paducah, for transfer to TVA (F. 51, App., *infra*, p. 113). It was decided that Dixon should prepare a study of the cost factors pertaining to construction of a plant across the river from Memphis (F. 53, App., *infra*, p. 114). Dixon and his staff began to draw up such a proposal. McAfee thereafter informed Dixon that he was not interested in participating in a project to build a plant at Memphis, since the location was outside his companies' pool area (F. 63, App., *infra*, p. 118). On February 20, 1954, the Southern Company, headed by Eugene Yates, accepted an invitation from Dixon to fill the vacancy left by withdrawal of McAfee (F. 65, App., *infra*, p. 120).

After numerous contacts with Budget Bureau representatives and the AEC staff, Dixon and his staff, on February 25, 1954, submitted the first formal proposal to the Government on behalf of Middle South Utilities and the Southern Company (the sponsors)[3] to construct a plant to furnish 600,000 kw. of power to the TVA at the Tennessee line, for the account of AEC (F. 71, App., *infra*, p. 125). Following an analysis of this first proposal by the Budget Bureau, the AEC, and the TVA, during which the sponsors' staff was regularly consulted by the Government, Dixon's engineer was advised on March 24 that the proposal was too high (F. 93, App., *infra*, p. 138). The Govern-

[3] By virtue of the names of the heads of the two companies, Messrs. Dixon and Yates, the sponsoring entity is frequently referred to as Dixon-Yates, the Dixon-Yates group, or the Dixon-Yates entity.

ment requested the sponsors to develop a further estimate (F. 93, App., *infra*, p. 138).

The sponsors then began to develop a new proposal which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, App., *infra*, pp. 139, 141, 142). After modifying the proposal in the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, App., *infra*, pp. 143, 146).

Although the Government had tentatively decided before January 20, 1954, to seek a contract of this nature with private companies (F. 45, App., *infra*, p. 108), there had been no firm decision at that time; on March 3, 1954, the AEC informed the Budget Bureau that either the President or Congress would have to determine the course of action which would be in the best interests of the Government (F. 80, App., *infra*, p. 132).

C. NEGOTIATION AND PERFORMANCE OF THE FIRM CONTRACT

On the basis of analysis of the sponsors' second proposal of April 1954, the Director of the Bureau of the Budget recommended to the President that he be authorized to instruct AEC to complete arrangements with the sponsors for a contract, and to instruct TVA and AEC to work out the necessary inter-agency arrangements (F. 129, App., *infra*, p. 157). On April 28, the Budget Bureau and the AEC received a telegram from another utility group, headed by a Mr. Von Tresckow, which offered to submit a proposal which would be more favorable (F. 129,

App., *infra*, p. 158). In early June, the Von Treseckow proposal was analyzed by the Government (F. 129, App., *infra*, p. 158). On June 14, the Dixon-Yates and Von Treseckow proposals, together with cost estimates for a TVA plant at Fulton, Tenn ~~Missouri,~~ were laid before the President of the United States and Congressional leaders (F. 130, App., *infra*, p. 158). The President stated that the AEC would be instructed to negotiate with the Dixon-Yates group (F. 130, App., *infra*, p. 158). The instructions were issued on June 16, 1954 (F. 130, App., *infra*, p. 158).

Formal negotiation of the contract between AEC and the sponsors based upon the Dixon-Yates proposal of April 10, began on July 7, 1954 and terminated on November 11, 1954, with the signing of a contract (F. 133, App., *infra*, p. 159). The Government's negotiators for the formal contract were competent and aggressive; the negotiating sessions were lengthy, arduous, and hotly contested; the Government insisted on certain new provisions; and the representatives of the sponsors were not successful in their attempt to limit the Government negotiators to the provisions of the April proposal. In a general way the contract was within the terms of the proposal, but there were numerous changes and additions (Fs. 133-134, App., *infra*, pp. 159-160). The contract was thoroughly reviewed by the interested agencies of the Government, and was submitted to the Congressional Joint Committee on Atomic Energy (Fs. 134-135, App., *infra*, pp. 160-161). As indicated below, Adolphe H. Wenzell had nothing to do with the negotiation of the formal contract (F. 136, App., *infra*, p. 161).

By the time of the termination of the contract, the respondent had used its best efforts to comply with the contract provisions which were then operative (Fs. 16–17, App., *infra,* p. 93), and no representative of the Government had indicated that respondent had failed in any way to discharge its obligations under the contract (F. 21, App., *infra,* p. 94).

II

THE ROLES OF ADOLPHE H. WENZELL AND THE FIRST BOSTON CORPORATION

Adolphe Wenzell served as a consultant to the Bureau of the Budget in connection with this project during the period a proposal was being developed (supra, pp. 5–7); he did not take part in the later negotiations for a firm contract (*supra,* pp. 7–9). His Government service in this connection began January 18, 1954, and ended in April 1954. He considered his relationship with the Government to have terminated on April 10, 1954, the effective date of the sponsors' second proposal (F. 105, App., *infra,* p. 145). The Court of Claims has found that Wenzell performed no actual services for the Government after April 3, 1954 (F. 106, App., *infra,* p. 145).

A. WENZELL'S CONNECTION WITH THE FIRST BOSTON CORPORATION

Wenzell was a Vice-President of the First Boston Corporation, a leading investment banking firm, and was an engineer specializing in utility financing (F. 25, App., *infra,* p. 96). He was paid a salary plus a bonus based upon the amount of business he brought to the firm. He received such a bonus for 1954 (F. 125, App., *infra,* pp. 155–156). He also held 200 shares of stock in the firm, in his wife's name (F. 125, App., *infra,* p. 156).

First Boston had previously been employed in the financing of the Ohio Valley Electric Company, the utility furnishing power to the AEC at Portsmouth, Ohio (*supra*, p. 4). For its services it received a fee of $150,000, plus $20,000 for expenses (F. 27, App., *infra*, p. 98).

B. WENZELL'S GOVERNMENT SERVICE AS A CONSULTANT

1. *In general.* Wenzell's services were first offered to the Government in May 1953 when George Woods, Chairman of the Board of Directors of First Boston, suggested to Budget Director Dodge that Wenzell was well qualified to make a study desired by Dodge of the federal subsidy to TVA (Fs. 24, 25, App., *infra*, pp. 95–97). Wenzell served as consultant to the Budget Bureau making this study from May to September 1953 (Fs. 26, 28, 29, App., *infra*, pp. 97–98). The study contained certain recommendations, but these were not a factor in the decision by the Budget Bureau that AEC should seek a contract with private utility companies (F. 33, App., *infra*, p. 101).

After the Budget Bureau had requested the AEC to further explore, with Dixon and McAfee, the feasibility of a power plant at Paducah or Memphis (*supra*, pp. 4–5), Assistant Director of the Bureau, Rowland Hughes, who was overseeing this matter (F. 38, App., *infra*, p. 105), suggested to Director Dodge that Wenzell should be recalled (F. 45, App., *infra*, p. 108). Wenzell was to serve as a consultant during the exploratory discussions, in the area of comparative costs, particularly interest costs (F. 45, App., *infra*, p. 109), an important item (Fs. 55, 67, App., *infra*, pp. 115, 122). On January 14, 1954, Hughes asked Wenzell to

come to Washington (F. 46, App., *infra,* p. 109). This was the first contact with the Government Wenzell had in connection with the development of this project.

In Washington, Assistant Director Hughes told Wenzell about the President's Budget Message, reviewed the prior discussions with the utility executives, and said that great speed was needed to develop the project (F. 46, App., *infra,* p. 109). Wenzell was again hired by the Budget Bureau as a part-time consultant without compensation, but was to receive his transportation expenses and a per diem subsistence allowance from the Government (opinion below, App., *infra,* pp. 45, 52–53; Fs. 45–46, 99, App., *infra,* pp. 108–109, 140).

After learning that Wenzell knew both Dixon and McAfee, Hughes asked Wenzell to attend, on behalf of the Budget Bureau, the meeting scheduled for January 20 (*supra,* p. 5) and to use such influence as he had with the private utility people to impress upon them the need for prompt action (F. 46, App., *infra,* p. 109). Wenzell, accompanied by a First Boston officer (Paul Miller), attended the meeting of January 20, at which it was agreed between the Government and the utility executives that Dixon should make a study of the project (Fs. 50, 51, App., *infra,* pp. 111, 113). Since Dixon had to leave on a trip, it was also agreed that Wenzell would contact the engineering firm which serviced Dixon's projects, Ebasco Inc., and explain to them what was required (F. 53, App., *infra,* p. 114).

Wenzell had been asked by Assistant Director Hughes to stay in touch with Dixon and his associates on the development of a proposal and, particu-

larly, to help point up the real cost of money to be used in financing the project (F. 55, App., *infra*, p. 115). He advised both Hughes and the Dixon group on this matter throughout the period of his service (F. 55, App., *infra*, p. 115).

During the period the Government and the sponsors were developing the proposal of February 25th (*supra*, p. 6), Wenzell's assignment as a consultant related primarily to the cost of money (F. 74, App., *infra*, p. 128). From March 1, 1954, until the completion of his service, his function related principally to the total cost of the project (F. 74, App., *infra*, p. 128).

2. *Wenzell's dealings with the sponsors on behalf of the Government.* From the meeting of January 20, 1954, until April 10, the date he believes his service as a consultant ended in April 1954, Wenzell was in frequent contact with the sponsors on behalf of the Government.

While serving as a Budget Bureau consultant, he met privately with the sponsors or members of their staffs on January 27 (F. 55, App., *infra*, p. 114); February 3 (F. 56, App., *infra*, p. 115); February 4 (F. 57, App., *infra*, p. 115); February 14 (F. 61, App., *infra*, p. 118). He attended the meeting on February 19 at which Dixon successfully persuaded the Southern Company to join the project (*supra*, p. 6). On March 16, he made changes in his own handwriting on a copy of the sponsors' draft reply to a TVA-AEC analysis of their first proposal (F. 90, App., *infra*, p. 137).

In addition to the foregoing meetings alone with the

sponsors or their staffs, Wenzell met with them together with other Government representatives at the crucial meeting on January 20 (F. 50, App., *infra*, p. 111); on February 8, when TVA financial statements not available to the public were reviewed by members of the sponsors' staff preparing the first proposal (F. 59, App., *infra*, p. 116); February 23, when a tentative draft of the first proposal was discussed with the AEC staff and Assistant Director Hughes (F. 66, App., *infra*, p. 120); March 2, when the Budget Bureau staff reviewed the first proposal with Dixon's engineer (F. 75, App., *infra*, p. 128); March 15, when the Government reviewed with the sponsors their first proposal, in the light in a joint AEC–TVA analysis (F. 89, App., *infra*, p. 136); and April 3, when new cost estimates for the sponsors' second proposal were discussed with them (F. 97, App., *infra*, p. 139), and Wenzell was asked to encourage the sponsors to refine their figures farther (*infra*, p. 15).

During this period, Wenzell also talked by telephone to the sponsors or members of their staff on, at least 13 and possibly 15 occasions (Fs. 48, 58, 60, 61, 83, 88, 92, 94, 104, App., *infra*, pp. 111, 116, 118, 133, 136, 138, 145).

3. *Wenzell's participation in the analysis and submission of the sponsors' estimates and proposals.* The sponsors submitted tentative drafts of their two proposals to the AEC and the Budget Bureau before submitting their formal offers. Wenzell participated in meetings with the AEC and the Budget Bureau at which tentative drafts of the first and second proposals and the final version of the first proposal, were analyzed and reviewed. The sponsors were

present at some of these meetings (see *supra*, pp. 12–13). In addition, Wenzell was consulted in intra-government meetings on March 1 (when he brought an officer of First Boston, Powell Robinson, with him) (F. 74, App., *infra*, p. 127); March 2 (F. 75, App., *infra*, p. 128); March 9 and 11, when a joint AEC-TVA analysis of the first proposal was reviewed (F. 84, App., *infra*, p. 133); and April 3, when the revised cost estimates for the second proposal were reviewed (F. 97, App., *infra*, p. 139). During the meeting on March 1, Wenzell took the position that the cost estimates underlying the sponsors' first proposal were too high (F. 74, App., *infra*, p. 128). At the March 9th meeting, Wenzell was asked to talk to the sponsors' representative to determine whether they would submit a better proposal (F. 84, App., *infra*, p. 133).

In the course of a discussion with Budget Director Dodge on March 9, Wenzell stated that he did not feel qualified to advise on the matter of over-all costs. He recommended that the Budget Bureau obtain for this purpose the services of Francis L. Adams of the Federal Power Commission (F. 85, App., *infra*, p. 134). In the Government-sponsor meeting of March 16, he reiterated this suggestion in response to the sponsors' request for an independent analysis of their first proposal (F. 89, App., *infra*, pp. 136–137). Adams was retained for this purpose by the Budget Bureau on March 19 (F. 91, App., *infra*, p. 138), and played a significant role in the rejection of the first proposal and the recommendation that the second proposal be accepted as a basis for negotiation (Fs. 91, 93, 96, 100, 102, App., *infra*, pp. 138, 139, 141, 142).

At the April 3rd meeting (*supra*, pp. 13, 14), as a result of Adams' analysis, it was agreed that the revised cost estimates were better than those of the first proposal but that further refinement of the figures was required; and the Dixon-Yates group were told that, if they could submit a new proposal close to the revised cost estimates, the Budget Bureau would feel that it deserved serious consideration; Dixon and Yates agreed to outline such a proposal (F. 97, App., *infra*, p. 139). Later that day, Wenzell was told by the General Manager of the AEC that the sponsors had come close to submitting acceptable figures, and it was suggested that Wenzell encourage the sponsors to refine their figures and present a new proposal (F. 98, App., *infra*, p. 140).

f. *Wenzell's financial advice to the sponsors while a Government consultant.* In accordance with his understanding of his instructions from Assistant Director Hughes, Wenzell met with members of Dixon's staff on January 27, 1954, and told them that he was at their service as a representative of the Budget Bureau on the matter of the cost of money needed to finance the plan. As already indicated, such costs played an important part in the total cost of the project and the price at which the energy could be produced and sold (Fs. 55, 67, App., *infra*, pp. 114–115, 122).

On February 5, in response to a request by Dixon for a "personal favor" (F. 57, App., *infra*, p. 115), Wenzell consulted with the staff of First Boston on the matter of interest costs for the construction of a plant similar to the Ohio Valley Electric Company

(*supra*, pp. 4, 10), using three different hypothetical forms of capitalization (F. 58, App., *infra*, p. 116). He reported this information to both Dixon and Assistant Director Hughes (Fs. 58, 59, App., *infra*, p. 116). At Hughes' request, he met again with the First Boston staff on February 10, and obtained further information on the basis of a different hypothetical situation (Fs. 59, 60, App., *infra*, pp. 116–117). Again, the information was made available to both Hughes and Dixon (Fs. 60, 61, App., *infra*, p. 118).

The tentative proposal shown by the sponsors to the Government on February 23 contained a provision that the sponsors

> * * * have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation.

This statement was based on Wenzell's advice to Dixon as to First Boston's opinion of financing costs (F. 67, App., *infra.*, p. 122). At the same meeting, Wenzell also showed Dixon and Hughes a draft of an opinion-letter he had prepared, typed on a First Boston letterhead, to be sent by First Boston to Dixon, stating that debt securities for the project could be sold at an interest cost of 3½% (F. 67, App., *infra*, p. 121).

At Dixon's request, Wenzell arranged a meeting for him on March 10 with the Chairman of First Boston's Finance Committee for the purpose of obtaining a confirmation of the oral opinion Wenzell had given

him. Wenzell was present at this meeting (F. 86, App., *infra*, p. 135).

The second proposal prepared by the sponsors contained a provision on interest costs substantially the same as the provision contained in the draft proposal shown to the Government in February. Prior to final submission of the second proposal to the Government on April 12, this interest cost provision was made known to Wenzell by the sponsors. He knew that it was based upon the information he had obtained for them from First Boston (F. 104, App., *infra*, p. 144). On April 10, he again confirmed to Dixon that in First Boston's opinion, the interest for the project should be 3½% (F. 104, App., *infra*, p. 144).

5. *Wenzell's advice to the sponsors upon completion of his service as a Government consultant.* The morning of the day that the second proposal was submitted to the Government, April 12, Wenzell again met with the sponsors and the staff of First Boston for a formal confirmation of the oral opinion on interest rates which he had given to Dixon on April 10 (F. 107, App., *infra*, p. 145). Wenzell considered that by April 10 his Government service had been finished and that he was working solely in the interest of First Boston (F. 107, App., *infra*, p. 146). On April 14, First Boston delivered to Dixon a letter signed by the Chairman of its Finance Committee, giving a written confirmation of the information which Wenzell had furnished the sponsors. This letter was based upon a draft of the First Boston letter Wenzell had prepared and shown to Dixon and to Assistant Director Hughes in February (Fs. 67, 109, App., *infra*, pp. 121, 147). Between April 15 and May 18,

1954, Wenzell had a series of conversations with members of the sponsors' staff and of the First Boston staff concerning the project (Fs. 110, 112, 114, App., *infra*, pp. 148, 149, 150–151). He resigned from First Boston on June 1, 1955 (F. 125, App., *infra*, p. 155).

C. THE SPONSORS' AND FIRST BOSTON'S CONCERN OVER WENZELL'S DUAL STATUS

In February 1954, during Wenzell's activity as a Government representative, Dixon's counsel expressed concern over Wenzell's status. He told Dixon that, if it became necessary to finance the project, First Boston would receive first consideration for the financial agency because of its experience in the financing of the Ohio Valley Electric Company (*supra*, pp. 4, 10). The lawyer thought that, in view of the public-versus-private power implications of the project, a difficult situation might arise out of Wenzell's governmental activities if First Boston became financial agent for the sponsors. He did not consider that a conflict of interest was involved but thought the sponsors could not afford a situation where the opposition might make it appear that there was a taint of illegality. He told Dixon that Wenzell should discuss his situation with the Bureau of the Budget and with counsel (F. 68, App., *infra*, p. 123).

On February 23, Dixon spoke about the matter to Wenzell (F. 68, App., *infra*, p. 123). The same day, Wenzell discussed his role with Assistant Director Hughes (F. 69, App., *infra*, p. 123). He told Hughes that First Boston was the source of the information in the draft interest opinion he had shown to Dixon (*supra*, p. 16), and that the sponsors could use the

draft as a moral commitment by First Boston to arrange for financing at the interest rates stated. He pointed out that it could be charged that he, as a First Boston officer and consultant to the Budget Bureau, had improperly used his position to obtain business for First Boston. Although Wenzell spoke to Hughes about embarrassment to the Administration, he was chiefly concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well. Hughes said Wenzell was exaggerating the matter, but suggested that he report to his principals in First Boston and explore the matter with counsel (F. 69, App., *infra*, p. 124). The same night (February 23), Wenzell went over the matter with the President of First Boston, who felt that he should discuss his status with First Boston's counsel, Sullivan & Cromwell (F. 70, App., *infra*, pp. 123–124).

Three days later (February 26), Wenzell conferred with counsel. Arthur Dean, who usually handled First Boston matters, was away, and Wenzell spoke instead to Mr. Raben (Fs. 70, 72, App., *infra*, pp. 125, 126). He showed Raben a copy of the sponsors' proposal, and the First Boston opinion-letter he had drafted. Raben advised him (F. 72, App., *infra*, p. 126): (1) To resign forthwith and in writing; (2) should the proposal be accepted and should First Boston become the financial agent, then it should consider whether it wished to accept the business, and if so, whether it should charge a fee; (3) finally, to keep Bureau Director Dodge and Assistant Director Hughes fully informed about any developments, in-

cluding any decisions which First Boston might later make as to handling the project.

By telephone, Arthur Dean told Raben that he concurred in this advice. Dean saw the matter as a question of policy, rather than a conflict of interest (F. 72, App., *infra,* p. 126). The following day, Dean informed counsel for Dixon that he was working on Wenzell's problem. He later told the President of First Boston that Wenzell had been advised to resign (F. 78, App., *infra,* p. 130), and the latter assumed that Wenzell would follow this advice (F. 78, App., *infra,* p. 131). Later in the same week Dixon told his counsel that Wenzell had been advised by First Boston's counsel to resign at once (F. 78, App., *infra,* p. 130).

On March 3, Raben learned that Wenzell had not resigned. Dean talked to Wenzell by telephone and told him to resign promptly and in writing (F. 79, App., *infra,* p. 131). A week later, Raben learned in a telephone conversation with Wenzell that he had not yet resigned, but assumed from Wenzell's comments that he was about to do so. He, therefore, took no further action in the matter (F. 79, App., *infra,* p. 131).

On March 9, Wenzell called upon Budget Bureau Director Dodge. Among other things, he expressed his concern that, if the project were launched, First Boston might be barred from participating in the financing because of his employment as a consultant to the Bureau. Dodge thought that there would be a long period of negotiations and preliminary approvals before the question of financing would arise. He

told Wenzell, however, that, if it was likely that First Boston might participate in the project, Wenzell should finish up his work for the Bureau as soon as possible. Wenzell promised to submit to the Bureau of the Budget for its prior approval any question of compensation or publicity regarding financing for the project which involved his company (F. 85, App., *infra*, pp. 133–134).

Sometime in March, Dixon and his counsel met with Assistant Director Hughes. During the discussion, counsel for Dixon raised with Hughes the question of Wenzell's dual status. Hughes made no comment on the matter (F. 78, App., *infra*, p. 131).

Wenzell never submitted a formal resignation and he continued to participate in the development of the project until early April (F. 72, App., *infra*, p. 126). See *supra*, pp. 12–18.[4]

D. WENZELL'S RELATIONS WITH FIRST BOSTON DURING HIS GOVERNMENT EMPLOYMENT

As already indicated, Wenzell had continuous relations with First Boston, with respect to this project, during his period of Government employment.[5] At

---

[4] Although Budget Bureau officials were aware of Wenzell's relationship to First Boston at the same time that he was a Government representative, no representative of the AEC knew before December 1954 that Wenzell, while serving as a Budget Bureau consultant, had been meeting with and supplying information to the sponsors regarding the project, or the extent to which the sponsors were aware of Wenzell's activities in that regard (F. 126, App., *infra*, p. 156).

[5] In the Fall of 1953, after the completion of Wenzell's earlier work for the Budget Bureau (*supra*, p. 10), he allowed Chairman Woods of First Boston to read his report to the Bureau although he had been told it was a confidential document and

all of his visits to the AEC he registered as from First Boston, and gave that firm's address as his own (Fs. 47, 49, App., *infra*, pp. 110, 111). He brought Miller, a First Boston representative, to Washington in January at the outset of his service, and Miller sat in at the important early meeting on January 20th (*supra*, pp. 5, 11); Wenzell discussed the project with Miller from time to time in January, February, and March 1954 (F. 108, App., *infra*, p. 146). At Dixon's request, Wenzell ascertained First Boston's opinion on the money costs (*supra*, pp. 15–16), and shortly thereafter consulted again with First Boston on this matter (*supra*, p. 16). On February 23, 1954, he drafted an opinion letter on money costs, typed on First Boston stationery, which was shown to Dixon and the Government and which embodied the information he had received from the firm (*supra*, p. 16). At the March 1st meeting to discuss the sponsors' proposal of February 25th, he brought Powell Robinson, another First Boston representative (*supra*, p. 14). He arranged a meeting for Dixon with Linsley of First Boston (F. 86, App., *infra*, pp. 134–135). He discussed his relationship with First Boston, as affecting that firm's obtaining of the financing, with Assistant Budget Bureau Director Hughes and Director Dodge, as well as with counsel and First Boston officers (*supra*, pp. 18–21). The court found that, in his discussions with Hughes, Wenzell "was concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well" (F. 69, App., *infra*, p.

---

should not be shown; no one in the Bureau gave permission for Woods to see the report (F. 35, App., *infra*, p. 101).

124). And, although the Government was to pay his transportation expenses and subsistence allowance (*supra,* p. 11), most of the bills were actually submitted to First Boston and paid by it (F. 99, App., *infra,* p. 140).

E. RETENTION OF FIRST BOSTON BY THE SPONSORS AND THE DECISION AS TO ITS FEE

In February, 1954, Dixon asked his assistant to obtain information on the debt financing of a project similar to the Ohio Valley Electric Company (*supra,* pp. 4, 10). Information obtained from financial sources other than First Boston indicated that the financing could be obtained at 3½% (F. 62, App., *infra,* p. 118). In April, shortly before submission of the second proposal to the Government, Dixon again had his assistant check on the availability and cost of borrowed money for the project (F. 101, App., *infra,* p. 142). Wenzell's obtaining of such information for Dixon-Yates from First Boston has already been described (*supra,* p. 17). At the conclusion of the meeting at First Boston on April 12 (*supra,* p. 17), in which the information Wenzell had furnished him was confirmed, Dixon believed that he had retained First Boston as financial agent (F. 116, App., *infra,* p. 152). Wenzell also expected by that date, two days after he considered his Government service to have ended, that First Boston would be financial agent if a contract resulted from the sponsors' proposal (F. 108, App., *infra,* p. 146).

In late April, representatives of Lehman Brothers, an investment banking firm, approached Dixon's staff in an effort to have that firm considered in connection

with the financing of the project (F. 111, App., *infra*, p. 149). Dixon thought their participation might be desirable and he suggested this to First Boston (Fs. 111-112, App., *infra*, p. 149). That firm was not pleased at the idea and, after first offering to withdraw, indicated that it would participate only if it occupied the senior position in the transaction (F. 113, App., *infra*, p. 150). Dixon advised First Boston on May 12 that the sponsors wished both firms to participate in the financing; First Boston was to have the dominant position, a matter of importance in the financial community (F. 113, App., *infra*, p. 150). Chairman Woods of the Board of Directors of First Boston felt that if the financing was successful the accomplishment would be valuable advertising for First Boston and add to its experience; the advertising might lead to other business of the same kind (F. 113, App., *infra*, p. 150). No formal agreement was ever executed, but all questions of the financial agency were settled by May 12 (F. 116; App., *infra*, p. 152).

Chairman Woods believed that the financing which the firm had been retained to handle flowed directly from his offer of Wenzell's service to Bureau Director Dodge in May 1953 (F. 117, App., *infra*, pp. 152–153). Partly for that reason, he decided that First Boston should not charge a fee, and after some discussion this decision was confirmed by a resolution of the firm's executive committee on October 21, 1954 (F. 117, App., *infra*, p. 153). The decision, unprecedented in the firm's history (F. 123, App., *infra*, p. 155), was first indicated to the sponsors' staff and to Lehman Brothers in a meeting on November 17, 1954, six days

after the contract with AEC was signed (F. 118, App., *infra*, p. 153). The matter was not settled, however, at that time (F. 118, App., *infra*, p. 153). Dixon, who was informed of the meeting, did not understand that First Boston had made a final decision to charge no fee (F. 121, App., *infra*, p. 154).

On February 19, 1955, following a speech by a Senator criticizing First Boston and Wenzell, the firm issued a press release stating that Wenzell had served the Government without compensation; and that it was not charging a fee for its services to the sponsors (F. 120, App., *infra*, p. 154). The following May, Dixon asked for a clear statement of First Boston's position and, on the advice of its counsel, First Boston sent him a letter confirming that it wished no fee for its services (F. 121, App., *infra*, p. 154), a decision which surprised Dixon (F. 123, App., *infra*, p. 155). Shortly thereafter, Lehman Brothers decided that, in view of First Boston's decision, it would charge no fee (F. 122, App., *infra*, p. 155).

The Budget Bureau was never informed by Wenzell or any other representatives of First Boston that First Boston had been retained as financial agent (F. 127, App., *infra*, p. 156). The Budget Bureau had no notice of this fact until February 18, 1955 (F. 127, App., *infra*, p. 157). See *supra*, p. 21.

III

PROCEEDINGS IN THE COURT OF CLAIMS

Following the AEC's declaration that the contract was not valid (*supra*, p. 3), respondent filed a petition

in the Court of Claims on behalf of itself and for the use of twenty-four other parties to recover expenses and damages under the contract (R. 1–13). The United States defended on the ground that the contract was invalid because Adolph Wenzell's activities constituted a violation of the policy against conflicts-of-interest expressed in 18 U.S.C. 434 (*supra*, p. 2); and on five other grounds[6] (R. 101–111).

After a trial, the Court of Claims held that respondent was entitled to recover (App., *infra*, pp. 41–85). The majority of the court rejected all of the Government's defenses including that of conflict-of-interest. Mr. Justice Reed and Chief Judge Jones dissented as to that defense.

The majority held that Wenzell's activities did not constitute a violation of 18 U.S.C. 434 (*supra*, p. 2), since the possibility that his permanent employer, First Boston, might profit as financial agent if the proposal he was working on for the Government ripened into a contract was too remote to give him a present interest in the contract the Government was

---

[6] The other defenses were:

(*a*) That the Atomic Energy Commission was not authorized by the Atomic Energy Act of 1954 to make the contract.

(*b*) That the contract was not placed before the Joint Committee on Atomic Energy in the manner required by the Atomic Energy Act.

(*c*) That financing agreements required by the contract violated the Public Utility Holding Act of 1935.

(*d*) That plaintiff did not obtain all of the regulatory approvals required for it to arranage the financing necessary for performance of the contract.

(*e*) That the power contract was void for lack of mutuality.

discussing with Dixon-Yates. Second, the court held it significant that there was no concealment—Wenzell's activities were on the instructions, and with the knowledge and approval, of his superiors in the Budget Bureau. Citing *Muschany* v. *United States*, 324 U.S. 49, the court concluded that Wenzell's activities were not such as to render the contract unenforceable by this respondent against the United States on grounds of public policy.

The dissenting judges believed that Wenzell's activities were a plain violation of the policy expressed by Congress in 18 U.S.C. 434; that the knowledge and actions of Budget Bureau officials cannot waive the rule laid down by Congress; and that, since the contract resulted from negotiations which violated the statute, it is invalid as against an expressly defined public policy.

REASONS FOR GRANTING THE WRIT

This is much more than a well-known case. Not only has the ruling of the Court of Claims erroneously disposed of a matter evoking great public interest, but it has formulated a too-limited conflict-of-interest rule for all government representatives. This limited rule will continue indefinitely, unless overturned, to lessen for federal officials the uncompromising standard which Congress established almost a century ago during the Civil War. In 18 U.S.C. 434, prohibiting persons acting as agents of the United States from diluting their single-minded status by a direct or indirect interest in the business activities of a private entity with which they deal, Congress sought to protect the Government from the conscious and unconscious corrupting tendencies of any conflicting in-

terest. The closely-divided decision below has sharply reduced the scope of this statute, and therefore its effectiveness to achieve the legislative purpose, by three constricting rulings of law: *first*, that the negotiator's direct financial interest in the other party's (Dixon-Yates) probable subcontractor (First Boston) is too remote to come within the statute's coverage of "direct or indirect" adverse pecuniary interests; *second*, that his Government supervisors' knowledge of the negotiator's conflict-of-interest frees the transaction from the impact of the statute; and, *third*, that the traditional sanction of non-enforcement of the contract resulting from tainted negotiations cannot be applied because the respondent contractor, although fully aware of the facts, was not responsible for the dual-agent or his activities.

These three rulings by the principal tribunal for the judicial resolution of disputes over Government contracts strongly call for review. Individually and more strongly in combination, they diminish the protection of single-interestedness which Congress has maintained for federal dealings with private business, and they bite deep into an historical policy essential to the healthy operation of the Federal Government.

I

18 U.S.C. 434, *supra*, p. 2, forbids any Government representative from acting on behalf of the United States in the "transaction of business" with a business entity in the contracts or profits of which he has a direct or indirect interest. Wenzell's participation in the negotiations leading to an acceptable pro-

posal from the Dixon-Yates group brought him within this statute.

A. The court below agreed that Wenzell was employed by the Government to act for the United States, and that he transacted business for the United States with Dixon-Yates. The findings make this indisputable. *Supra*, pp. 10–15. He was retained as an expert consultant for the Budget Bureau and acted as such; he himself informed members of the Dixon-Yates staff that he was at their service as a representative of that agency (F. 55, App., *infra*, p. 114).[6] In that capacity, throughout the ten weeks of his participation, he actively transacted business for the Government with the sponsors in numerous conferences, telephone calls, and conversations; in intra-government analyses and supervision of the sponsors' cost estimates; in encouraging them further to refine their figures and submit new estimates; and as a general expediter for the Budget Bureau on this

[6] Wenzell was hired by the Budget Bureau under its appropriation for 1954, 67 Stat. 299, to hire consultants by contract under Section 15 of the Administrative Expenses Act of 1946, 60 Stat. 810, as amended, 5 U.S.C. 55a. That authority also extended to service without compensation. 27 Comp. Gen. 194.

The Federal Government has long employed temporary consultants, agents, and advisers—both with and without compensation—the number varying with the needs of the times. Dembling and Forrest, *Government Service and Private Compensation*, 20 G.W.L. Rev. 174, 179. Whether retained with or without compensation, such irregular employees have been considered by the Executive Branch to be subject to the conflict-of-interest statutes. See, *e.g.*, 40 Op. A.G. 289; 40 Op. A.G. 294; 41 Op. A.G., No. 64. The fact that a Government employee may advise in transactions concerning his private employer without being directly connected with procurement activities has been held to make no difference. 40 Op. A.G. 168.

project. He was a significant Government negotiator, and his activities were on a par with those of the permanent federal employees dealing with the sponsors.

The "business" then being transacted with the Government by the Dixon-Yates group (a business entity which ultimately became the respondent) was the development of a proposal which would form an acceptable basis for a contract with the United States to furnish electric power. That these negotiations were preliminary and necessarily tentative does not make them any the less "business transactions" within Section 434. The statute broadly covers all "transaction of business" by any federal agent with any "business entity", and that phrasing includes the preliminary stages of business dealings as well as the final steps. It could not well be otherwise since the form and substance of the ultimate agreement is most often—particularly where, as here, the proposal is developed in closed negotiations with a selected business entity—the filial product of the earlier course of negotiations. In this very case, for instance, the Court of Claims itself said that "[w]hile the [formal] contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work" (App., *infra*, p. 54), and the court's findings disclose that, although there were many changes and additions to the proposal, the final contract was "[i]n a general way" within the proposal's terms (F. 134, App., *infra*, p. 160; see *supra*, p. 8).

B. The majority below recognized these factors, and also that Wenzell had a direct pecuniary interest

in the profits and contracts of his permanent employer, First Boston (as a vice president paid a salary and a bonus, *supra,* pp. 9–10). Nevertheless, the court felt that his financial interest in the developing Dixon-Yates agreement with the Government was too remote to constitute even an "indirect interest" in that entity's contracts. On the facts found by the Court of Claims itself, we agree with Mr. Justice Reed and Chief Judge Jones that this is far too narrow a reading of the statute. Section 434 was designed to reach this kind of indirect goading self-interest, as well as more direct incentives.

1. Wenzell was directly and pecuniarily interested in having First Boston obtain the financing of the project, since he could expect substantial compensation if that occurred. As the Statement shows, *supra,* p. 24, First Boston was anxious to have the business, which it was not absolutely certain to receive even if the Dixon-Yates group did consummate a contract with the Government; and, of course, it was first of all necessary that such a contract be concluded. Accordingly, it was to Wenzell's direct pecuniary advantage ~~adantae~~ (i) that an agreement be reached by Dixon-Yates and the Government on the project, and then (ii) that the financing be given by Dixon-Yates to his firm, First Boston. During the negotiations for the proposal, he had a clear opportunity to advance both objectives, and a clear monetary reason to do so. In our view, that gave him at least an "indirect" financial "interest" in the Dixon-Yates contract he was engaged in negotiating.

536830—60——3

2. This "indirect interest" of Wenzell's is not taken out of Section 434 by the fact that the Dixon-Yates entity did not yet, during the period of his participation, have a final agreement with the Government. As we have indicated (*supra*, p. 30), the statute's broad terms obviously apply during the preparatory negotiations which normally mold the final contract. Otherwise, a Government negotiator who was to receive from the contractor a definite percentage of its profits on the very agreement he was negotiating could simply immunize himself from liability by resigning after the initial negotiations but before the final consummation of the contract. It is plain that such tainted influences during the informal preparatory dealings can easily have lasting consequences reaching to the ultimate product.

3. Nor was Wenzell's activity outside the statute because his firm, First Boston, did not have an outright commitment for the financing but only a very high probability of obtaining it. As the majority below admits in its opinion, "by the logic of circumstances" First Boston "might be offered the work of arranging the financing of the project when and if a contract" should be made (App., *infra*, p. 56).[7] If 18 U.S.C.

[7] This statement in the opinion underrates the force of the court's own findings of fact. As early as the week prior to February 27, 1954, Dixon and his counsel were talking in terms of giving First Boston first consideration as financial agent (F. 68, App., *infra*, p. 123; *supra*, p. 18). On February 23d. Wenzell told Assistant Director Hughes of the very distinct possibility that First Boston would be retained, particularly because he used that firm to obtain information on money costs to supply to Dixon (F. 69, App., *infra*, p. 123; supra, pp. 18-19); and he had a similar conversation with Director Dodge

434 is properly read, such a plain possibility that the federal official's private firm would become an important subcontractor under the prime contract being negotiated is sufficient to give him at least an "indirect interest" in that agreement.

The all-inclusive terms of the legislation were designed to prevent the Government's actions in its dealing with private parties "from being influenced by *anyone* interested adversely to it" (*United States* v. *Chemical Foundation*, 272 U.S. 1, 18, emphasis added) and for "the removal of *any* temptation to violate" the trust relationship of public office (*Rankin* v. *United States*, 98 C. Cls. 357, 367, emphasis added). "[E]ven penal provisions must be 'given their fair meaning in accord with the evident intention of Congress.' *United States* v. *Raynor*, 302 U.S. 540, 552." *Rainwater* v. *United States*, 356 U.S. 590, 593.[8] This case falls both within the section's literal terms and its evident purpose to protect the United States

---

on March 9th, in which he again indicated his concern that his firm might find itself barred because of his activities for the Government (F. 85, App., *infra*, pp. 133–134; *supra*, p. 20). As shown in the Statement, *supra*, pp. 21–23, First Boston was to the fore throughout the negotiation periods and it very much desired the role of financing agent (*supra*, p. 24). It was informally retained by April 12th, almost immediately after Wenzell felt that he had terminated his government services (*supra*, p. 23).

[8] The antecedent of 18 U.S.C. 434 (including the phrase "person directly or indirectly interested in the pecuniary profits or contracts") was originally incorporated, without debate, as an amendment from the floor of the Senate (62 Cong. Globe 954) into the bill (S. 467, 37th Cong.) which became the False Claims Act, Sec. 8 (Act of March 2, 1863), 12 Stat. 696, 698.

from the corrupting tendencies inherent in the bare fact that federal representatives have a significant pecuniary interest in the agreement they are negotiating. Cf. *Waskey* v. *Hammer*, 223 U.S. 85, 93. It matters not to Congress whether the Government employee's adverse interest derives from a direct relationship with the contractor, or indirectly from his connection with a subcontractor which will probably profit from the contract of the business entity with which the United States is directly dealing. Congress was not concerned with the niceties of privity, but with the possibilities of fraud, undue influence, and absence of single-mindedness. The temptations which may lure an employee from the strictly impartial performance of his duty can be as present where the dual interest arises from a relationship with a potential subcontractor as where the employee is an officer of the potential prime contractor itself. The exception for employees of prospective subcontractors which the court below finds in the statute (App., *infra*, pp. 56-62) was not put there or suggested by Congress—which is, of course, the principal organ for the establishment of standards of conflict-of-interest. Congress has left the broad wording of 18 U.S.C. 434 in effect for almost a century. See footnote 8, *supra*, p. 33.[9]

[9] When Congress approved the retention of technical consultants from private industry without compensation for the purposes of the Defense Production Act of 1950, it expressly authorized the President to hire them subject to an exemption from the terms of 18 U.S.C. 434. Sec. 710 (b), (c), (d), Act of September 8, 1950, 64 Stat. 819. After reconsidering the need for such exemptions in time of peace, Congress expressly prohibited consultants retained thereunder from participating in the negotiation of contracts. 69 Stat. 582, 50

C. Since 18 U.S.C. 434 is a flat preventive prohibition, it is irrelevant that (1) no derelictions in negotiating may have been proved against Wenzell; (2) the final contract turned out to be fair and honest; (3) Wenzell himself did not subjectively believe that he was advising parties whose interests were in conflict (F. 106, App., *infra*, p. 145), or (4) Wenzell's general goal of having the project built by private enterprise may have accorded with that of the Government (App., *infra*, pp. 52–53, 95). The statute "does not stop with actual violations of * * * trust relations, but includes within its purpose the removal of any temptation to violate them." *Rankin* v. *United States*, 98 C. Cls. 357, 367; see also *Muschany* v. *United States* 324 U.S. 49, 64–5, 67. The injurious possibilities of double-interest led Congress to establish an across-the-board rule, independent of the particular circumstances of the particular transaction. In this case, those possibilities (flowing from a desire for personal gain through First Boston's probable participation if an agreement were reached by the Government with the Dixon-Yates group) *could* well have led Wenzell to concur too easily with the sponsors as to specific items of the proposals or of the cost-estimates (even though there might not be any disagreement between the Government and the sponsors on the desirability of a private, rather than public, project); or to fail to press the Government's position or interests vigorously enough (on items of cost, etc.); or to counsel acceptance by the Government

U.S.C. App. 2160. See H. Rept. No. 1343, 84th Cong., 1st Sess.; Conf. Rept. No. 1630, 84th Cong., 1st Sess.

of a proposal which should not have been approved in that form, at that price, or on the basis of the cost-estimates submitted.[10]

II

The Court of Claims erroneously placed heavy reliance on the fact that Budget Bureau Director Dodge and Assistant Director Hughes were aware of Wenzell's relations with the First Boston Corporation (see the Statement, *supra*, pp. 10–11, 18–19, 20–21). Neither official felt it necessary to consult the legal officers of the Government. Neither official had been authorized by Congress to exempt anyone from the conflict-of-interest laws. What they were powerless to do directly could not be accomplished by acquiescence in, condonation of, or ignorance of, violations of the law. In considering the effect of their

---

[10] As detailed in the Statement, *supra*, pp. 17–18, 21–23, the findings of the Court of Claims themselves show that Wenzell kept First Boston very much to the front throughout the negotiations, and very much in mind. When he discussed his dual status with Director Dodge and Assistant Director Hughes, his principal concern was that First Boston could be embarrassed (F. 69, App., *infra*, p. 124) and might be barred from participation in the project's financing because of his activities (F. 85, App., *infra*, p. 134). Even after being advised that his activities were subject to charges of illegality and that he should resign (*supra*, pp. 19–20), he continued to act as a Government representative and to consult First Boston until just before the submission of the final proposal. By the time the sponsors' first proposal was submitted, he recognized that there might be thought to be a moral commitment to the sponsors by his company to arrange for financing at the rates stated in the proposal (F. 69, App., *infra*, p. 124); and the information he obtained from First Boston at the very last moment of his period of Government service became the basis of the financial estimates in the second offer, a day or two later (F. 104, App., *infra*, p. 144).

actions, the majority below failed to recognize that 18 U.S.C. 434 is designed to protect the United States as a sovereign entity from the mistakes (as well as the connivance) of its own officers and agents. It would amount to a drastic amputation of the statute if acquiescence (even in good faith) by an officer's superiors in his prohibited double-agency excused the violation and deprived the United States of the very protection the statute was intended to confer. Any official who purports to waive that protection without express authority from Congress is acting *ultra vires*, and his unauthorized acts cannot stand against the Act. *E.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380. The majority opinion below was plainly influenced by its feeling that the Government's position in this litigation was (in its view) "essentially cynical" in the light of the Budget Bureau's knowledge of and participation in Wenzell's double-agentry (App., *infra*, pp. 56–57). But, as was observed in a related context, "indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress." *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 308–309.

III

A contract substantially infected, as this one was, by a violation of preventive conflict-of-interest legislation like 18 U.S.C. 434 is unenforceable as contrary to the public policy embodied in the statute.[11] The court

[11] See *Muschany* v. *United States*, 324 U.S. 49, 66–68; *Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258; *Rankin* v.

below refused to apply this accepted rule, not only because it incorrectly thought that there had been no violation of 18 U.S.C. 434 (discussed *supra*, pp. 28–37),[12] but also because it opposed placing that heavy sanction upon the respondent which was not Wenzell's employer. The denial of relief for the latter reason calls for review here, along with the other two holdings of the Court of Claims.

A. Much stress is laid upon the fact that the sponsors (respondent's predecessors) could not remove Wenzell from the transaction since they had not put him into it. However, they were fully aware of, and alive to, Wenzell's conflict-of-interest (*supra*, pp. 18, 21), and it *was* within their power to remove that conflict. If Wenzell had been known to be a substantial stockholder of the Dixon-Yates companies themselves, the Dixon-Yates group could not have dismissed him from his Government employment or severed his connection with their own company. But we submit that they would have been required to attempt to obviate the conflict by refusing, so far as they could, to deal with him. Here, they could remove the conflict by taking far less drastic action; they had only to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction. Wen-

---

United States, 98 C. Cls. 357; cf. *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446 (1885).

[12] There is no doubt that Wenzell's participation in the negotiations prior to the submission and acceptance of the sponsors' final proposal was sufficiently significant to affect the formal contract, which was generally within the terms of the proposal. See *supra*, pp. 8, 11–17, 29–30, 32.

zell himself was aware of this possibility (F. 85, App., *infra*, p. 133; *supra*, p. 20).

Instead, despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell, dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract. See the Statement, *supra*, pp. 15–18, 23). There is, therefore, little ground for complaint of undue hardship when the means of clearing the air of the taint were so readily at hand and so simple to apply, but were not used.[13]

B. In any event, such hardship is not a controlling consideration. The contract respondent seeks to enforce is invalid because it issued from a transaction tainted by a violation of the policy against conflicts-of-interest established by Congress. *Supra*, p. 37. That policy requires that the contract not be enforced, regardless of the asserted hardship to the contractor.

C. Finally, the sanction of non-enforcement—not unfair to contractors who have reason to know of the conflict-of-interest but do not take what action they reasonably can—is an effective and appropriate supplemental remedy against contravention of the Congressional mandate by complacent, ignorant, or negligent officials, as well as by conniving or negligent double-agents. If that remedy exists here, actual and

[13] As Chief Judge Jones points out in dissent below (App. *infra*, p. 85), the Dixon-Yates people, who were no "novices", may have wished to have Wenzell (who was known to them) as a "friend on the inside" who could help them in the negotiations with the Government and in the financing.

potential contractors will not content themselves with merely expressing concern over a conflict-of-interest. But if the remedy does not exist, as the court below held, not even the concern exhibited here will be expressed in the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
SAMUEL D. SLADE,
HOWARD E. SHAPIRO,
Attorneys.

JANUARY 1960.

APPENDIX

In the United States Court of Claims

No. 479–55

(Decided July 15, 1959)

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS v. THE UNITED STATES

Mr. John T. Cahill and *Mr. William C. Chanler* for the plaintiffs. *Mr. Robert G. Zeller* was on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Messrs. John B. Miller*, *Herman Wolkinson* and *Robert E. Kaufman* were on the brief.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, an Arkansas corporation, made a contract with the United States, dated November 11, 1954. The Atomic Energy Commission, (AEC), was the agency which acted for the Government in the transaction. The contract required the plaintiff to build and operate a large plant for the generation of electricity, the plant to be located at West Memphis, Arkansas, across the Mississippi River from Memphis, Tennessee, and to sell the electrical energy there generated to the United States. After the site for the plant had been acquired and some preliminary work had been done by the plaintiff, but before any considerable amount of construction of the plant had taken place, an important event occurred which eliminated the Government's need for the electricity which it had contracted to buy from the plaintiff.

Because of the elimination of its need for the electricity, the Government, through the AEC, on July 11, 1955, orally, and on August 1, 1955, by letter, notified the plaintiff that the

Government was terminating the contract. On November 23, 1955, the AEC wrote the plaintiff that the Government had concluded that there had never been a valid contract between the parties. The Government's position is that, there never having been a valid contract, it is not liable to the plaintiff for any costs incurred by the plaintiff prior to the termination of the contract nor for any damages caused to the plaintiff by its termination. The plaintiff's position is that the contract was valid, and that the Government is liable to the plaintiff for the costs which the plaintiff incurred in connection with the contract.

The Tennessee Valley Authority, (TVA), an agency of the United States, operates the largest unified enterprise in the country for the generation and distribution of electricity. Its general field of operation is the area drained by the Tennessee River and its tributaries. Since its establishment in 1933, it has constantly expanded its operations as the demand for electricity has increased. The AEC uses a large amount of electricity in its three plants at Oak Ridge, Tennessee, Paducah, Kentucky and Portsmouth, Ohio. TVA supplied the current used at the Oak Ridge plant and a considerable part of that used at the Paducah plant. The Portsmouth plant was supplied by the Ohio Valley Electric Corporation, (OVEC), a corporation formed by several nearby private utilities in 1952 for the purpose of contracting with the AEC and building a generating plant to supply electricity to the AEC's Portsmouth establishment.

TVA was supplying some 1,000,000 kw of electricity to AEC at Paducah, from TVA's generating plant at Shawnee, Kentucky. To meet the growing demands upon it, particularly in and about Memphis, Tennessee, TVA desired to build a new plant, to be operated by steam, at Fulton, Tennessee, on the Mississippi River upstream from Memphis, with a capacity of about 450,000 kw. Both houses of Congress had in 1952, however, rejected proposed amendments to TVA appropriation bills which amendments would have appropriated money to start construction of the Fulton plant.

The policy of the Eisenhower Administration, which took office in January 1953, was to have either private enterprise or local communities, rather than the United States, provide

electric power generating facilities. The President's State of the Union message of February 2, 1953, announced this policy. The President's new Director of the Budget, Mr. Joseph Dodge, eliminated from the 1954 fiscal year budget the appropriation for the Fulton plant, which appropriation President Truman had proposed in that budget.

The Administration's policy with regard to public power was observed with approval by Mr. George D. Woods, chairman of the board of directors of First Boston Corporation, one of the leading investment banking concerns in the United States. First Boston had its offices in New York. Mr. Woods wanted to help to make the policy succeed. He obtained an appointment with Mr. Dodge, the Director of the Budget, and offered the services of First Boston. Mr. Dodge, a Detroit banker, new in the Government, wanted to have a study made to determine the controverted question of the extent to which the Government was really subsidizing the TVA. He needed a man experienced in public utility financing and expert in accounting and problems of the cost of money, and had not found such a man. Mr. Woods said that First Boston had such a man, Mr. Adolphe Wenzell, and he would see if Wenzell would undertake the work.

Wenzell was willing and, with the approval of his other superiors, he did accept the assignment. He served as a part-time consultant to the Bureau of the Budget, without compensation, but was to have $10 per day in lieu of subsistence, and reimbursement of his transportation expenses. It was understood that Wenzell would not sever his connection with First Boston and that he would continue to receive his regular salary from it. Wenzell began this work on May 20, 1953, and made his report to Dodge about September 20. In all, he spent 29 days in the Bureau of the Budget, and became acquainted with many of its staff. He had access to all pertinent reports and documents. His report, not surprisingly, indicated that the Government was, to a considerable extent, subsidizing the TVA. When he made his report to Dodge, he asked for and received permission to retain a copy, but was told that it was a confidential Bureau document and should not be shown to anyone else. Some time later Woods asked Wenzell to see the report and Wenzell let him read it.

The work which Wenzell did for the Bureau of the Budget in 1953 resulted in his getting acquainted with Rowland R. Hughes, then the Assistant Director, later the Director, who, as we shall see, was a principal actor in the events in 1954 leading to the contract here in litigation.

In the fall of 1953 the Bureau of the Budget decided that it would not include money for the Fulton plant, desired by TVA, in the TVA appropriation figure to be presented to Congress in 1954, for the fiscal year ending June 30, 1955. Mr. Gordon Clapp, the General Manager of TVA, when he learned of this Budget decision, took the position that TVA must be allowed to reduce the amount of electricity it was supplying to AEC so that it would have electricity to satisfy the growing needs of other patrons. The Bureau began to draft language to be included in the President's budget message to the effect that an attempt would be made to relieve TVA of some of its power delivery to AEC, and that if that could not be done, the problems of the Fulton plant would be reconsidered.

Director Dodge in December of 1953 suggested to Admiral Lewis I. Strauss, Chairman of the AEC, and Mr. Walter J. Williams, AEC's General Manager, that capital expenditures by the Government for the Fulton plant could be avoided if AEC would contract with private industry for the construction of a generating plant that would supply 450,000 kw of power to AEC at its Paducah plant and thereby release the power which TVA was supplying there, so that that power could be used by TVA for its other requirements. Mr. Dodge reminded these men that, in two other instances, private utilities had made long-term contracts to supply power to AEC.[2] Mr. Williams said he would consult with Mr. McAfee, who was president of one of the companies referred to by Dodge. McAfee's response was encouraging.

Dodge delegated to Hughes, the Assistant Director, the responsibility for the Bureau's part in pursuing the inquiry. AEC's only interest was in being assured an adequate supply of power. The interest of the Bureau of the Budget was that the necessary power be obtained, if possible, in a manner consistent with the Administration's policy of promoting a

private enterprise economy and keeping Government expenditures as low as possible.

Edgar H. Dixon, president of Middle South Utilities, Inc., which owned utilities operating in Arkansas, Louisiana and Mississippi, learned from McAfee that AEC might be seeking an additional source of power in the Paducah area. He was interested because of the possibility of selling power and because he, like Woods of First Boston, wanted to lend a hand to the Administration in its effort to put the business of generating power into private hands. Dixon went to see Strauss, and conferred with him and his principal assistants. Hughes, at the Bureau of the Budget, learned of the meeting. He requested AEC to proceed with negotiations with private interests with a view to having additional power available not later than the fall of 1957. McAfee and Dixon were invited to a meeting to be held in Strauss's office on January 20, 1954.

About January 15, 1954, Hughes suggested to Dodge that Wenzell be again requested to assist the Bureau, because of his study of TVA and his knowledge of commercial transactions. By that time, the Administration had decided that the AEC should make a contract to purchase power from private sources, and that the Fulton plant would not be built. The Administration's fixed purpose, by that time, was to find private enterprisers willing to contract with it, and to make a fair and prudent bargain with them. Wenzell had had no part in those decisions.

For the Bureau of the Budget to know what would be a fair bargain, it had to know what interest rate the enterprisers would have to pay on the bonds which they would have to sell to finance the project. Wenzell was an officer of First Boston, a large enterprise whose business it was to find purchasers for such bonds. Since Hughes knew him and trusted him, it was natural that he should look to him for advice on the cost of money. Wenzell came to Washington on January 18, 1954, and conferred with Hughes. Hughes told him of the meeting with Dixon and McAfee, arranged for the 20th. He learned that Wenzell knew both these men, and asked him to attend the meeting and use his influence to impress upon them the need for prompt action on their part in getting up a

proposition to the AEC. Hughes then arranged for Wenzell to see Strauss, whom he had not met before. Strauss also emphasized to Wenzell the necessity for prompt action.

At the January 20 meeting, McAfee and Dixon pointed out that if an additional generating plant should be built near Paducah, and the AEC should later need less power, there would be no other market for the power in that area. It was recognized that the real need for power was in the Memphis area, some 200 miles from Paducah, and that the new power, though bought and paid for by AEC, would be delivered to TVA and used by it to supply its customers. Dixon thought a more logical arrangement would be for TVA to contract directly for the needed power, rather than have AEC contract for it. The meeting moved to Hughes' office in the Bureau of the Budget. It was decided that Dixon would prepare a study of what it would cost for his company to construct a plant, across the river from Memphis in the territory of his Middle South company, capable of generating some 450,000 to 600,000 kw of power. To the suggestion of McAfee and Dixon that the arrangement of having AEC contract for power to be delivered to and used by TVA was awkward, Hughes responded that the decision as to what agency of the Government would make the contract would be made by the Government.

At the close of the meeting in Hughes' office, Wenzell and Dixon agreed that Wenzell would meet with a Mr. Seal of Ebasco, a company which performed engineering services for Dixon's companies, to enlighten Seal and thus expedite the study which Dixon was to make. Wenzell met with Seal in New York and reported to him the substance of the discussions up to date. He urged him to get to work on the study which Dixon had promised. On January 27 Seal and a Mr. Canaday, a vice president and director of Dixon's Middle South company, went to Wenzell's office in New York. They were engaged in formulating a plan for the project. Wenzell told them he would give them any help he could on the subject of the cost of money for the project. On January 29, Hughes telephoned Wenzell to find out what had happened at Wenzell's meeting with Canaday and Seal.

Wenzell had another meeting with Canaday and Seal, other visits with Hughes, and received a request from Dixon

that Wenzell get the opinion of First Boston on what the interest rates would be on the bonds in such a project. Wenzell called together the First Boston experts on the subject, and telephoned the answer to Dixon. During the following days, Wenzell had several meetings with representatives of the interested private utilities at some of which other representatives of the Government were present. All these meetings were held either at the request of or with the knowledge of Hughes with whom Wenzell was in frequent touch by telephone.

When McAfee learned that the proposed plant was to be located in the Memphis area, he lost interest because that location was outside the area of the companies in which he was interested. Another company showed some interest in collaborating with Dixon, but shortly abandoned the idea. Hughes was disturbed because he feared that if Dixon could not get another company to join in the project, he might abandon it. About February 18, Dixon told Wenzell that he was to have a meeting the next day at the offices of The Southern Company, the owner of public utility companies operating, generally, in Georgia, Alabama and Mississippi. Wenzell reported this to Hughes who asked him to attend the meeting. Eugene A. Yates was the chairman of the board of directors of Southern, and was at the meeting, as were the other important officials of Southern.

Wenzell had known Yates for many years but had not, before this meeting, talked to him about the project here in question. Dixon made an earnest plea that Southern join in the project. Wenzell telephoned Hughes, reporting what occurred at the meeting. About February 20 Southern decided to take part in the project. Yates immediately notified Hughes. Dixon's Middle South and Yates' Southern are sometimes hereinafter called the sponsors.

Canaday and Seal had been working up a proposal and, on February 20, after Southern had agreed to join in the project, they began to put the proposal in draft form. On February 23, Dixon and Wenzell met Hughes at the Bureau of the Budget. Dixon showed Hughes an early draft of the proposal. On the same day Dixon, Yates, Kenneth D. Nichols, the General Manager of AEC, Wenzell and Mr. McCandless of the Bureau of the Budget reviewed the tenta-

tive draft to see whether it was complete enough to merit consideration by AEC. The draft which was reviewed said that it assumed a cost of money which had been given to it by responsible financial specialists; and that the offer was conditioned upon the sponsors' being able to obtain the money at those rates. In fact, the advice as to the cost of money had been given orally by Wenzell to Dixon, and had been incorporated in a draft of a letter written by Wenzell and addressed to Dixon on February 23, intended to be signed by First Boston, but never actually so signed or delivered.

On February 25, Dixon's Middle South company and Yates' Southern company submitted to AEC a formal proposal offering to form a new corporation which would finance and construct generating facilities from which 600,000 kw of electric power would be delivered to TVA at the middle of the Mississippi River at Memphis, the power to be paid for by AEC. The proposal went into detail as to the terms of the contract, the method of computation of the charges for the power, reimbursement for taxes, etc. When AEC received the proposal, it asked the Bureau of the Budget for its opinion. Hughes introduced Canaday, Seal, and Barry of Southern, to Mr. Schwartz, Chief of the Resources and Civil Works Division of the Bureau. Hughes told Schwartz that he wanted an analysis of the proposal by March 2, and that the men whom he had introduced would be available to answer questions. The Bureau staff commenced the study. The AEC staff began a similar study.

Hughes advised Schwartz that Wenzell would come to see him on March 1. When he arrived, the staff was completing the study and preparing the memorandum which Hughes had requested. Wenzell sat in the conference and took the position that the estimates of costs in the proposal were too high.

On March 2 there was a meeting of the Bureau staff and Wenzell and Seal of Ebasco. Seal was shown the proposed staff memorandum and was questioned about various items in the proposal of February 25. After Seal had left, the staff, with Wenzell participating, completed its memorandum, which said that it did not have sufficient information to make a close analysis, comparing costs with those of TVA, and that active participation by TVA would be required for

such an analysis. The memorandum concluded by saying: "We believe that the rates involved are sufficiently close that negotiations should be entered into by the parties concerned." Wenzell then went to Seal's office, told him that the memorandum had been completed, and that Clapp of TVA and Nichols of AEC were to meet with Hughes on March 3.

Between March 3 and March 9, Wenzell, in New York, had telephone conversations with Hughes, Schwartz, Canaday, Seal, Yates and Dixon. All of these conversations related in some way to the project. On March 9, representatives of the Bureau of the Budget, AEC and TVA met and reviewed the draft of the analysis of the February 25 proposal. Wenzell was not present. Later in the day, in the Bureau, the completed draft was distributed to a group which included Wenzell, and a member of the staff gave an oral summary of the analysis. All present were of the opinion that the estimated costs in the proposal were too high. Wenzell was asked to so advise Seal and to find out whether the sponsors would make a better proposal. Wenzell advised Seal that the estimated costs were too high. Wenzell discussed with Dodge the subject of the estimated costs, told him that he, Wenzell, was not qualified to advise the Bureau on that subject, and suggested that the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission, be obtained. Dodge said he would find out whether Adams would be available.

On March 10, Dixon and Yates met with Mr. Linsley, chairman of First Boston's executive committee, in Linsley's office. Wenzell was present. Dixon was well acquainted with Linsley and had frequently asked for his opinion on security issues and the condition of the money market. Dixon wanted Linsley's opinion on the current situation with regard to financing a project such as the OVEC, which First Boston had assisted in financing some years before, and which was comparable to the proposed project.

On March 11 Wenzell attended a meeting of the staff of the Budget Bureau. As a result of the meeting, an AEC representative, Mr. Cook, telephoned Dixon and told him wherein the estimated costs were too high. A copy of the AEC-TVA analysis was given to Seal and Canaday who

were asked to study it and submit their comments, together with the sponsors' minimum cost proposal by March 15 or 16. On March 16, Dixon, Yates, and their principal assistants met with Dodge. In preparation for this meeting, Dixon and his associates had met in his hotel room and prepared a draft of a letter to be sent to AEC in reply to the AEC-TVA analysis. Wenzell may have been present at the meeting. In any event, he was given a copy of the draft and made changes on it in his handwriting. The letter was never put in final form, signed, or delivered to AEC. Wenzell was present at the meeting with Dodge. Dixon and his associates urged Dodge to have an analysis made of their February 25 proposal by someone other than the AEC-TVA group. Wenzell renewed his suggestion that Adams of the Federal Power Commission be requested to make such an analysis. On March 19 Adams began to do that. On March 24 Adams and representatives of the Bureau of the Budget met with Seal, and Adams told him that the figures in the February 25 proposal were too high, and asked him to have the sponsors submit new estimates of costs. Adams had, on March 23, discussed with Wenzell the subject of the cost of money for the project. Wenzell, between March 17 and March 30, had telephone conversations with representatives of the sponsors, and of the Bureau. On March 30 he was asked by the Bureau to be present at a meeting on April 3.

The sponsors had become aware that their February 25 proposal would not be acceptable. They prepared new cost estimates and submitted them to Hughes, Adams and others on April 3, at the meeting which Wenzell had been requested by the Bureau to attend and did attend. The sponsors were told that if they would submit a new firm proposal based upon their revised cost estimates, it would deserve serious consideration. It is probable that during this meeting Wenzell stated to Dixon, Yates and Hughes that the information which he had previously given them with regard to the interest rate on the bonds of the proposed project was still valid.

Also on April 3d Wenzell talked to Nichols at AEC. Nichols told him that the sponsors' new figures were close to being acceptable. He asked Wenzell to encourage the sponsors to refine their figures and to submit a proposal based on a

fixed price for the construction of the new facilities, with details as to the basis on which the charges for power would be calculated.. He told Wenzell that AEC could not consider a proposal which was not firm as to capital costs, nor one which did not contain cancellation provisions acceptable to the AEC. After the meeting with Nichols, Wenzell returned to New York, and did not make any more trips to Washington in connection with the project here involved.

The sponsors prepared a new proposal, after numerous discussions in Washington involving representatives of the sponsors, the Bureau of the Budget, and AEC. Dixon delegated a representative to inquire of various investment bankers and institutional investors as to the cost of money for such a project. This inquiry showed that the rate of interest would be about 3½%, which was the figure that Wenzell had on prior occasions given to Hughes and to the sponsors.

On April 12, 1954, the sponsors submitted their new proposal, which was dated April 10. A representative of the sponsors had, some days before the submission, informed Wenzell that it contained a statement that the sponsors' offer was conditioned upon their being able to arrange financing upon the terms which responsible financial specialists had advised them would be available. On the morning of April 12, before the sponsors went to Washington to submit their proposal, they met in Linsley's office at First Boston. Wenzell was present. Linsley was requested to and agreed to give them a written opinion, signed by First Boston, confirming Wenzell's prior statements as to the current rate of interest on bonds for such projects.

The April 10 proposal received intensive study and analysis by the Bureau of the Budget, AEC and TVA, and representatives of the sponsors were called in for information and discussion. On April 24 Hughes, who had, on April 16, 1954, succeeded Dodge as Director of the Bureau, recommended to the President that the Bureau be authorized to instruct AEC to proceed to negotiate a contract with the sponsors, and to instruct AEC and TVA to work out the necessary interagency arrangements. On May 27 a proposal was received from another group headed by a Mr. Von Tresckow. This proposal was studied, and on June 14 Hughes and Strauss presented summary analyses of the Dixon-

Yates proposal, the Von Tresckow proposal and of the cost of the proposed Fulton TVA plant, to congressional leaders in conference with the President.

On June 16, with the approval of the President, Hughes gave to AEC and TVA the instructions which, he had, on April 24, recommended to the President. On June 30, AEC wrote the sponsors that their April 10 proposal "constitutes a satisfactory basis for negotiation of a definitive contract", and that AEC was ready to begin negotiations. Negotiations began on July 7 and ended with the signing of the contract here in litigation on November 11, 1954.

The Conflict of Interest Defense

Adolphe Wenzell's study of TVA for the Bureau of the Budget in 1953 is of significance in this case only as background. Through that work he became acquainted with Dodge, Hughes and others of the Bureau staff. He became recognized by Hughes as a man sympathetic to the Administration's purposes and policy with regard to public power and private enterprise. His company, First Boston, was expert in the financing of large utility enterprises. When the Administration decided that it would, if it proved feasible, obtain the needed additional electric power by contracting with a private generating enterprise, Hughes thought of Wenzell as a possible useful consultant and obtained Dodge's permission to employ him.

It hardly needs to be said that Wenzell and his permanent employer, First Boston, wanted the explorations into the possibility of making a contract for the erection of a generating plant with private capital to eventuate in a contract. Their enthusiasm in this purpose equalled, no doubt, but could hardly have exceeded, that of the President of the United States and his Director of the Bureau of the Budget. Wenzell was not hired by the Director to discover reasons why a contract should not be made. He was hired because he was a knowledgeable person and was on the Administration's side of the political-economic controversy about public versus private generation of electric power. It could hardly have been expected that the Administration would hire, as a consultant an expert from the ranks of the enthusiasts for

public power. The Administration's policy was a perfectly legitimate one, and it had a right to use all legitimate means to make its policy succeed. Its powerful urge to get a contract put it at a possible bargaining disadvantage, but no claim is made in this case that the contract which was made was an improvident one.

Wenzell's function of advising the Government as to the cost of money, a large element in the cost of electric power produced by a plant built with borrowed money, was not an arduous one. A few well placed telephone calls by any responsible person would probably have obtained such information.

Hughes really used Wenzell as an expediter. When Hughes learned that Wenzell knew McAfee, Dixon, and other important utility executives who showed an interest in the project which the Administration hoped to consummate, he used Wenzell to keep their interest alive and to get it into the form of a proposal which the Government could consider. Time was important. The construction of the needed plant would take years after a contract had been made. Those who preferred that the additional power should be obtained from a plant built by TVA with Government money were politically powerful, and were able and persistent. If the need became pressing, and there was no promise that private enterprise would satisfy it, the Administration's policy could not be maintained

Wenzell discussed the subject freely with the representatives of the private sponsors. At the stage of proceedings during which he was employed by the Bureau of the Budget, there were no secrets. Every intelligent person knew that the Administration wanted to make a contract, and was anxious that private enterprise come forward with a proposal that would be acceptable. Hughes directed Wenzell to sit in the meetings of the sponsors and report to Hughes what he heard. He participated in the conferences of the agency staffs. He, no doubt, was able to give to Hughes a better overall view of events than any other person, and did, we should suppose, expedite the formulation of the proposal which formed the basis for the later negotiation of details and exact figures.

Wenzell had substantially nothing to do with the substance of the contract. He knew little about construction

costs and said so, recommending Adams to the Bureau for that function. The cost of money was determined by forces beyond the control of the contracting parties. While the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work. At any rate, he served the Administration faithfully in the tasks it assigned to him.

The Government says that the contract is invalid because of Wenzell's activities. It says that he had conflicting interests. As between the parties, the Government and the plaintiff which succeeded to the interest of the Dixon-Yates sponsors, we see not the slightest conflict of interest in Wenzell's position. The interest which he shared with the President and the Bureau of the Budget, that the negotiations should produce a contract, was the Government's interest, though it coincided with the sponsors' interest. He served the Government, did what he was assigned to do, did nothing for the Dixon-Yates interest and received nothing from it.

The Government says that a conflict of interest resulted from Wenzell's position with First Boston. When the Government hired Wenzell, it knew of his position with First Boston, and it knew what business First Boston was in. It wanted Wenzell's advice as to the cost of money borrowed to build generating plants. There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract. As early as January 1954, it occurred to Mr. James, counsel for Dixon, that because of the public versus private power controversy which lay behind the whole project, and because First Boston would be a logical choice of the sponsors to manage the financing of the enterprise, if a contract should be made, critics of the project might make something of Wenzell's participation. At his counsel's suggestion, Dixon spoke to Wenzell, calling attention to the possibility of criticism, and suggesting that Wenzell discuss the matter with the Bureau of the Budget and with his counsel. Wenzell on the same day, February 23, spoke to Hughes about the matter, saying that it might become a matter of embarrassment to the

Administration, and suggesting that Hughes discuss the subject with his political advisers. Hughes said that Wenzell was exaggerating the importance of the matter, but advised him to discuss it with his principals in First Boston and with First Boston's lawyers, and then talk to Dodge about it. Wenzell, on February 23, discussed the subject with Mr. Coggeshall, President of First Boston, who arranged for him to talk to Mr. Raben of Sullivan and Cromwell, First Boston's counsel. Wenzell told Raben that he had orally advised Dixon as to the cost of money borrowed for such projects, and had written a draft of a letter containing the same information. He said that First Boston had not been employed by the sponsors to handle the financing, but that it might be requested to do so if the Government and the sponsors should succeed in making a contract. Raben advised Wenzell to terminate his employment as consultant in the Bureau of the Budget forthwith, and in writing; to advise First Boston that if it was later requested to handle the financing, if a contract should be made, it should consider whether it would be wise to do so, or, at least, whether it would be wise to accept a fee for doing so. Raben also told Wenzell to keep Dodge and Hughes informed of any developments in the matter. Raben telephoned to his senior partner, Arthur Dean, who was in Washington. Dean said he did not think there was a conflict of interest, but there was a problem of policy. He confirmed Raben's advice as to what should be done.

Wenzell did not resign from the Bureau of the Budget immediately, but continued to work for it until April 3. Hughes did not call upon him for any services after that date. He never submitted a written resignation.

At least as early as April 12, Wenzell was of the opinion that if the Government and the sponsors made a contract, First Boston would be asked to undertake the financial arrangements for the sponsors. As it turned out, his assumption was unfounded, because, a month after that time, Dixon felt perfectly free to place 40 percent of the financing business with Lehman Brothers, and would, apparently, have felt perfectly free to place all of it elsewhere than with First Boston if he had so desired.

As we have said, the Government pleads the activities of Wenzell as a justification for its repudiation of its contract

with the plaintiff. This presents a problem which obviously requires exploration. Ordinarily, in a conflict of interest case, there is a person who is acting for the Government in the negotiation of a contract but, who at the same time, has an interest in the other party to the contract which interest would cause him, or tempt him, to promote the contract, or permit favorable terms to be inserted in it, because that other party, and he through it, would profit by his acts. Ordinarily the conflicting interest of such a person is unknown to his superiors, or to those of his superiors who are faithful to their duties to the Government.

The instant situation is unusual in several respects. Wenzell had no interest in the plaintiff, which the Government seeks to make the victim of Wenzell's situation. He was not hired by the plaintiff; he owned no stock in the plaintiff. He had an interest in First Boston which company, by the logic of circumstances, might be offered the work of arranging the financing of the project when and if a contract for the project should be made. The sponsors had, during the time that Wenzell had been working for the Bureau of the Budget, made no commitment to or had any discussion with First Boston about handling the financing of the hoped for project. That the sponsors did not feel that they were, somehow, under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came, in May, to make arrangements for the financing of the hoped for project, Dixon, as we have seen, insisted over the objection of First Boston that Lehman Brothers should have a 40 percent interest in the financing, because that firm had some special talents that might be of use.

The sponsors, though they had not employed Wenzell, nor given him any interest in their enterprise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' ad-

monition to Hughes, who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government, but adequate to destroy the enemy if it became necessary to resort to such a weapon. There is, it seems to us, something essentially cynical about the Government's Wenzell defense.

The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skilful bargaining by representatives of the Government who had complete fidelity to their trust, and which became useless to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power. The purpose of the contract being thus frustrated, the Government summons, in order to escape its responsibilities under its honest contract, the great moral and legal generalization that a servant cannot faithfully serve two masters. We think the applicability of the generalization to the instant situation must be carefully scrutinized, lest, not uniquely, a worthy principle be used to arrive at an unworthy result.

Suppose the Government wanted to determine the feasibility of building a bridge in a difficult location. An experienced and reputable bridge engineer is an official of a steel company. The Government employs him as a consultant to work with Government staff engineers and other consultants to determine whether, and how, the bridge could be built; and to work out the terms of a contract with a contractor who has shown an interest in building the bridge. The consultant works through the feasibility stage of the investigation, and during the preliminary stage of negotiation with the contractor, when the question was whether the bridge could be built at a price which the Government would

consider it prudent to pay. Then the consultant ceases his work. The terms and details of the contract are laboriously worked out by faithful representatives of the Government and the contractor. The contract is signed. The contractor then begins to place its orders for the steel which it will need to build the bridge. It, for good business reasons, orders some of the steel from the company whose engineer had been employed by the Government as a consultant. Some event intervenes which convinces the Government that the bridge ought not to be built at all, and it cancels the contract. The contractor has been subjected to expense by the steps it took toward performance before the contract was canceled. It requests reimbursement for those expenses. The Government disclaims liability, on high moral principles. It concedes that the contract was an honest one, fairly negotiated and agreed upon. It is obvious that if its intervening change of mind had not occurred, and the contract had continued to be regarded as advantageous to the Government, the Government would have insisted upon performance and would have sought to recover damages from the contractor if it had refused or failed to perform. But, it says, we, with full knowledge of the possibility that his company might make a profit by selling steel to the contractor if it should be decided that it was feasible to build the bridge, and if a contract to build it should be made, employed a consultant who had a part in the early stages of the deliberations about the bridge. The purported contract is, therefore, for moral reasons, a nullity.

In the hypothetical case, and in our instant case, the possibility of the consultant's principal employer's indirectly making a profit out of the project about which he was consulted, would extend to almost any conceivable private industry from which a competent consultant could be obtained. If an industry is not engaged in the kind of business about which the Government needs practical advice, it will not be called upon to furnish a consultant. If, then, the Government intends to treat the possible indirect interest of a consultant's employer as injecting a taint of illegality into any contract which might eventuate, the whole transaction becomes futile nonsense, a nullity before the beginning of

even preliminary discussion. The Government itself has introduced the impurity into the draught, and later spurns it, because it itself has polluted it.

In *Muschany* v. *United States*, 324 U.S. 49, 66–67, the Supreme Court said, with regard to the Government's argument that the contracts there in question were in violation of public policy and were therefore void:

> Our inquiry at this point, since corruption is not shown, is as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case.
>
> * * * * *
>
> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal* v. *Philadelphia*, 2 How. 127, 197–98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353; *Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy.

Our conclusion is that Wenzell's activities were not within the prohibition of the statute, 18 U.S.C. § 434,[1] on which the Government relies, nor were they such as to render the contract in question unenforcible on grounds of public policy.

We think that, to reach the conclusion that the criminal statute here in question had in fact been violated, we would have to discard all the precedents with regard to the proper interpretation of criminal statutes. We would have to conclude that 18 U.S.C. 434 was intended by Congress to be an

---

[1] "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

expansive net long enough and broad enough to catch a Government employee and subject him to fine or imprisonment if he saw in the transaction a possibility that it might eventuate in a profit to him, or if he thought, mistakenly, that it would eventuate in a profit to him.

As we have seen, Wenzell's employer, First Boston, through which Wenzell's criminal conduct must be established, if it is established, did not have an interest in the Dixon-Yates transaction until after Wenzell's Government employment had terminated. There is not a shadow of evidence that it had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding. As we have seen, a month after Wenzell's Government employment had terminated, Dixon-Yates felt perfectly free to give the bond-selling business to whomever it pleased.

To treat such a prospect, or hope, or even mistaken belief in a nonexistent understanding, as a direct or indirect interest, subjecting the possessor of it to a fine or imprisonment or both, would seem to us to require that we discard all that the Supreme Court has taught us as to how to interpret a criminal statute. *Kordel* v. *United States*, 335 U.S. 345; *United States* v. *Halseth*, 342 U.S. 277; *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284; *Yates* v. *United States*, 354 U.S. 298.

It is suggested that there is something sinister about the fact that Wenzell did not, as the lawyers for First Boston advised him to do on February 26, resign from his Government work "immediately, and in writing." Three days earlier, Wenzell had discussed with Hughes the possibility that if a contract should be made with the sponsors, First Boston might be asked to participate in the financing of it. Hughes thought that Wenzell was exaggerating the importance of the matter, and kept on calling on Wenzell to

do chores for him in connection with the contract, until April 3. The fact that Wenzell did not resign "in writing", he having been employed by means of a telephone call, and all of his assignments having been given him orally, shows that he did not understand the importance which the lawyers attached to having documentary evidence in the file for a possible Congressional investigation or a lawsuit. We see nothing sinister in his not being cagy. The lawyers did not advise Wenzell to resign because they saw in his situation a conflict of interest. They saw in it a question of policy, for First Boston. On March 9 Wenzell was told by Dodge, the Director of the Bureau of the Budget, that since there was, at that time, not even a proposal which could be used as a basis for negotiation, and in any event a long period of negotiation would precede the making of a contract and its financing, there was no immediate problem with regard to First Boston's possible participation in the financing. He said that if there was a possibility that First Boston might participate in the financing, Wenzell should wind up his work for the Bureau of the Budget as soon as possible. As we have seen, Hughes, Dodge's Assistant Director, kept on giving Wenzell chores to do for some three weeks longer, until April 3. We think that Wenzell's failure to resign ostentatiously and immediately; as a lawyer might have done, is of no significance.

The Government urges, in effect, that the doctrine which it calls to its defense is a prophylactic generalization which must be applied in cases of honest transactions in order to keep it available and effective in cases of dishonest transactions. The thought is that the Government, like the infant and the idiot, must have the protection of a broad legal incapacity. In this case the actor for the United States was the Director of the Budget, acting immediately under and on behalf of the President of the United States. What he did was done legally, honestly, and with complete fidelity to the interests of the Government. The powers of even the Government's highest officials are defined by statute. We do not see in the case before us an instance in which the Government needs, as additional protection against the honest acts of its highest officials, a diaphanous cloak of immunity woven from an asserted vague and undefined public policy. We point

again to the language of the Supreme Court in the *Muschany* case.

The Government has interposed other defenses, in addition to the one founded upon the activities of Adolphe Wenzell. Because this opinion is already long, our treatment of these defenses will be brief.

The "Replacement" Defense

The Government says that section 164 of the Atomic Energy Act of 1954, 68 Stat. 951, 42 U.S.C. § 2204, did not authorize the AEC to make the contract here in question. We quote the part of the section here pertinent in a footnote.[3] The argument, in brief, is that the electric power contracted for in the contract in question was not to be used by AEC, and was not to be furnished to TVA "in replacement" of power furnished by TVA to AEC. The legislative history of section 164 shows that its language was written for the purpose of authorizing the very kind of a contract that was eventually made. If furnishing power to TVA at Memphis so that TVA could continue to furnish power to AEC at Paducah without neglecting to fulfill the expanding needs of its existing customers is not aptly describable as replacing to TVA power furnished by it to AEC, then Congress can be said to have used inept language. That would, if true, be no reason for a court to frustrate the undoubted intention of Congress.

The "Waiver" Defense

The Government says that certain statutory requirements of section 164 of the Atomic Energy Act of 1954, *supra*, were not complied with, and that the contract, as a consequence, never became effective. It relies on the following language in section 164:

---

[3] "The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof."

> Any contract hereafter entered into by the Commission pursuant to this section shall be submitted to the Joint Committee and a period of 30 days shall elapse while Congress is in session (in computing such 30 days, there shall be excluded the days on which either House is not in session because of adjournment for more than three days) before the contract of the Commission shall become effective: Provided, however, That the Joint Committee after having received the proposed contract, may by resolution in writing, waive the conditions of or all or any portion of such 30-day period.

The contract here in question was submitted to the Joint Committee on Atomic Energy on November 11, 1954, the day the contract was signed. Congress was not in session at that time, and that Congress did not reconvene. The new Congress convened on January 5, 1955. The Joint Committee had been in session for some days before November 11, considering drafts of the contract, and considering whether the committee should waive the 30-day waiting period. On November 13 the committee adopted, by a 10 to 8 vote, a resolution waiving the waiting period. On January 28, 1955, the Joint Committee adopted, by a vote of 10 to 8, a resolution rescinding the resolution of waiver of November 13, 1954.

The Government says that the Joint Committee had no authority to sit when Congress was not in session and that the purported submission of the contract to the committee on November 11, and the committee's purported waiver of the waiting period on November 13, were ineffective. AEC, in a brief filed with the Securities and Exchange Commission in proceedings in January 1955, seeking that Commission's approval of the plaintiff's equity financing, took the position that the Joint Committee had the power, though Congress was not in session, to waive the 30-day waiting period. The defendant herein, the United States, took the same position in a brief filed as *amicus curiae* with the United States Court of Appeals for the District of Columbia, in proceedings to review the SEC's order approving the plaintiff's equity financing. The General Counsel of the AEC, and the Assistant Comptroller General of the United States, in formal official opinions, took the same position. We agree with

these several opinions of representatives of the United States, rendered *ante litem motam*.

The "Indemnity" Defense

The Government says that the contract in question violated the following provision of section 12(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79(L) (a):

> It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to borrow, or to receive any extension of credit or indemnity, from any public utility company in the same holding-company system or from any subsidiary company of such holding company * * *.

In order to insure that the plaintiff would have sufficient income to amortize its bonds, as payments for that purpose came due, an agreement between the plaintiff and the operating subsidiaries of the sponsors was drafted, under which the subsidiaries agreed to take and pay for any surplus power which the plaintiff might have on hand because of the failure of TVA to take the agreed amount, and the subsidiaries also agreed to make up any shortage of power which the plaintiff might incur because of, for example, the disabling of its generators. The sponsors guaranteed the performance of the agreement by their respective subsidiaries. This agreement was called the "back-up and surplus power agreement." The making of this agreement was required by section 2.02 of the contract here in suit. The agreement was never actually executed because the Government's cancellation of the plaintiff's contract intervened.

The Government says that this agreement was a violation of section 12(a) of the Holding Company Act, quoted above. The SEC in its decision approving the plaintiff's equity financing, expressly held that the back-up and surplus power agreement was not a violation of section 12(a) of the Holding Company Act. The interpretation of that provision of that Act, and its application to various possible arrangements within utility systems, is peculiarly a subject for the expert handling of the Securities and Exchange Commission. We are not persuaded that its decision was erroneous.

The "Regulatory Approvals" Defense.

The Government says that the contract had not become effective because the plaintiff had not, at the time the Government terminated the contract, secured all the regulatory approvals which were required. The Government refers to section 8.15 of the contract which reads as follows:

> *Regulatory Approvals and Indebtedness:* The obligations of the parties hereunder shall be subject to the following:
>
> (1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;
>
> (2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract; * * *.

The Government points out that, though the SEC had approved the plaintiff's equity financing, that approval had been appealed to the United States Court of Appeals for the District of Columbia; that though the plaintiff had applied to the SEC for approval of its bank loan agreements and bond sale agreements, the SEC had not yet acted upon this application. It urges that since the regulatory approvals had to be "in form and substance satisfactory to the Company" (plaintiff), not only had the contract not become effective in point of time, but it was invalid for lack of mutuality, since the plaintiff could escape liability under it by being dissatisfied with the approvals which the pertinent regulatory bodies would give it.

The parties expressly agreed, as shown in our findings 8, 9 and 191, that the contract became effective December 17, 1954. They must, therefore, have construed the provisions of section 8.15, quoted above, as conditions subsequent. As such, they would mean that the plaintiff could escape liability only if it could not, after diligent effort, obtain regu-

latory approvals which would be satisfactory to a reasonable person, in the circumstances. There is no indication that the plaintiff was not diligent in seeking the necessary regulatory approvals, or would have been dissatisfied with such approvals as were practically attainable. So far as appears, the only reason the plaintiff did not get the approvals was that the Government's cancellation of the contract rendered the plaintiff's applications moot.

We conclude that none of the Government's defenses is valid, and that it is liable to the plaintiff for its breach of the contract.

The Measure of Damages

The plaintiff does not seek to have its damages measured by the usual rule, which would entitle it to the profits which it would have made if it had been allowed to perform its contract and receive the compensation provided in the contract. The plaintiff says that the contract in question provided its own agreed measure of damages in case the Government should cancel the contract. It points to section 7.07 of the contract, entitled "Cancellation Prior to Completion." That section, which is quoted in full in finding 205, provides in paragraph 1 that if, prior to the commencement of commercial operation of the third unit of the plant, the power requirements of AEC should be so reduced that it no longer needed the power contracted for, and if TVA did not elect to take the power, AEC should be entitled to cancel the contract by written notice, the effect of the cancellation being stated in paragraph 2.

Paragraph 2 of section 7.07 provides that if the notice of cancellation should be delivered prior to the time when the plaintiff had incurred expenditures of $40,000,000 on the project, then

> the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable liabilities, costs, in-

> debtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, including carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; * * *

The Government points out that there was no reduction in the power requirements of the AEC, hence the Government could not have canceled and did not cancel the contract pursuant to the provisions of section 7.07. The plaintiff says that it has the right to waive the wrongfulness of the cancellation and have its damages measured by the provisions agreed upon for cases of rightful cancellation.

The Government's insistence that its cancellation was a breach of contract, rather than a cancellation permitted by the contract, is an attempt by the Government to profit from its own wrong. We say this because we suppose that the Government would not take this position unless it thought it saw in it an advantage to be gained by having the damages determined by a measure other than that agreed upon in section 7.07 of the contract.

We think that paragraph 1 of section 7.07, fairly, though not literally, read, was applicable to the cancellation here in question. The cancellation took place because the Government no longer needed the power contracted for. The indirect and awkward arrangement of the contract was to have AEC purchase power to be delivered to and used by TVA. Section 7.07(1) said that if AEC's power requirements were reduced so that it did not need the power contracted for, and if, then, TVA did not elect to take it, AEC might cancel the contract, with the cancellation consequences provided in section 7.07(2). In fact, as both parties knew, AEC was never intended to get the power, and the lack of need for it by TVA would be the event that would necessitate and justify the cancellation of the contract. The essential purpose of section 7.07 was to provide a method of measuring damages if cancellation should occur, as it did, before the plant was built and put in operation.

We further think that the plaintiff's argument that the condition upon which the Government might lawfully cancel the contract, with a defined and limited liability for damages, was a condition which it could insist upon, or waive, at its election, and that the Government cannot elect to be a wrongdoer, an unjustified contract breaker, in order to gain some real or supposed advantage from its assumed turpitude, is a valid argument.

If the parties had foreseen what in fact occurred, and had covered that occurrence by an agreement specifically and unquestionably applying to the events that occurred, as to how to measure the damages, we do not see how the Government could have urged that it should pay less for a wrongful cancellation than for a rightful one. That much, at least, may be said for the fairness of the plaintiff's contention. In any event, the measuring of damages for the breach of a contract which is to be performed over many years, here 25 years, is a speculative and unsatisfactory task. It is not unnatural that a court, in such a case, would wish that the parties had agreed upon a formula which would permit the damages to be measured by arithmetic, rather than by speculation and prophecy. When the parties have in fact agreed upon a formula readily applicable to the situation at hand, though they did not agree to its application to that exact situation, we think a court has the right to make use of the formula, if to do so seems fair to the court. In short, we do not think that one of the parties has a right to require a court to measure damages by a hard and unsatisfactory method, when that party has agreed to an easier and more satisfactory method for a closely comparable situation.

The language of the second paragraph of section 7.07 of the contract, quoted above, is our guide as to what items should be included in the plaintiff's recovery. It was at all times during the negotiation contemplated that the sponsors were to form a new corporation which would sign and perform the contract. The expenses which the sponsors paid or became obligated to pay were proper charges against the new corporation, the plaintiff, and are therefore proper subjects of recovery by the plaintiff. The expenditures made and obligations incurred by the plaintiff after its incorporation,

in connection with the negotiation of the contract, its performance, and the mitigation of damages after its cancellation are recoverable. The counsel fees and expenses incurred by the sponsors are not vulnerable on the ground of duplication of services. It was natural that each sponsor should have the advice of its own counsel with regard to this important venture. The costs of administrative and court proceeding engaged in for the purpose of obtaining the necessary regulatory approvals is includible. Interest at the legal rate on the money invested by the sponsors in the stock of the plaintiff, computed to the date of termination of the contract, is a recoverable item, according to the language of section 7.07 of the power contract and of section 4.02 of the "interpretative memorandum."

Counsel fees and other expenses incurred in preparing for and prosecuting the instant litigation may not be recovered.

In paragraphs 19 and 22 of its petition, the plaintiff says:

> The plaintiff will also incur additional expenses prior to the satisfaction of the judgment herein, the amount of which will be supplied by amendment hereto.

The parties stipulated at the trial that, with regard to post-petition claims, only the question of liability would be presently decided, and the amount of the recovery, if any, would be determined in further proceedings. Expenditures made and obligations incurred after the filing of the petition, incident to the termination and settlement of commitments made in connection with the making and performance and termination of the contract, are recoverable.

The claims asserted on behalf of plaintiff and several of the use-plaintiffs for "compensation for the loss of the use of their money represented by their respective claims" are not recoverable. These claims amount to a request for an allowance of interest on the judgment awarded, and since neither the Power Contract nor any applicable statute provides for such an award of interest, none is recoverable in this action. 28 U.S.C. § 2516. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585.

We conclude that the plaintiff is entitled to recover on the following claims in the amounts indicated:

Claim	*Finding*	*Amount claimed*	*Amount allowed*
Dickmann-Pickens-Bond Construction Co	210	$14,553.03	$14,553.03
J. A. Jones Construction Company	212	143,160.33	[1] 143,160.33
Pandick Press, Inc	213	38,338.76	38,338.76
Reid & Priest	214	7,097.42	7,097.42
House, Moses & Holmes	215	7,500.00	7,500.00
Arthur Andersen & Co	216	16,469.66	16,469.66
Middle South Utilities, Inc	217	4,651.86	[2] 3,032.11
The Southern Company	218	29,391.29	[3] 21,147.45
Arkansas Power & Light Co	219	7,484.09	7,484.09
First National City Bank of N.Y	220	500.00	500.00
White & Case	220	500.00	500.00
Mississippi Valley Generating Co	221–230	618,658.07	[4] 616,158.76
Ebasco Services, Inc	231	570,727.59	[5] 565,028.02
Cahill, Gordon, Reindel & Ohl	233–235	235,198.76	[6] 232,491.75
Winthrop, Stimson, Putnam & Roberts	236–238	104,128.67	[7] 103,296.62
Willkie, Owen, Farr, Gallagher & Walton	239–240	75,787.85	75,787.85
Milbank, Tweed, Hope & Hadley	241–242	15,[illegible].00	15,000.00
Total amount allowed			1,867,545.56

[1] This amount includes $11,027.79 for the benefit of Oman Construction Company.

[2] There is disallowed $1,619.75 representing an unnecessary expenditure for transcripts.

[3] Payments to Southern Services for salaries, overhead and travel expenses of its personnel in the sum of $2,446.55 in connection with the April 10, 1954, proposal to AEC and also in the amount of $2,999.28 in connection with negotiating the Power Contract, are disallowed as coming within the categories of unreimbursable expense defined in the interpretative memorandum set forth at the end of finding 218. There is also disallowed $2,798.01 as an unnecessary expenditure for transcripts.

[4] There is disallowed $2,500.00 representing the value of the sand deed acquired by plaintiff.

[5] There are deducted and disallowed $3,239.15 and $1,500.42 because of plaintiff's failure to show that Ebasco was not required to absorb these expenses. There is also disallowed $960.00 because of plaintiff's failure to show that this item was a true liability.

[6] There is disallowed $2,707.01 representing 63½ hours spent in preparing the petition in this lawsuit.

[7] There are disallowed: $264.74 representing 7 hours at an average hourly rate of $37.82, which time was spent in preparing the petition in this lawsuit; $567.30 representing 15 hours spent on the proposal to TVA.

Judgment will be entered for the plaintiff in the above total sum, said sum representing the amounts found to be due the plaintiff on a portion of its claim. The amount due the plaintiff on the remaining portion of its claim will be determined in further proceedings pursuant to Rule 38(c).

It is so ordered.

LARAMORE, *Judge*, and ALBERT V. BRYAN, *District Judge*, sitting by designation, concur.

ALBERT V. BRYAN, *District Judge*, concurring:

The very law points now mooted to defeat the contract as unauthorized were originally vouched by the Government to conclude it. These remain unbowed. Besides, admittedly every act now pleaded to impugn the contract, as the opinion of the court also well recounts, was "begun, continued and ended" in good faith and in the full knowledge of the Government. In truth there was no imposture.

To vitiate the contract as a potential imposture, the Government would invoke the biblical precept, embedded in public policy and statute, denouncing duplicity in agency. With this doctrine it would first condemn its own agent for pursuing aboveboard the honest directions of his Government. Then the principle would be interposed against the plaintiff notwithstanding that the Government's agent was never the agent of the plaintiff or ever "interested" in the plaintiff's "pecuniary profits or contracts"—notwithstanding, too, that the Government gave the plaintiff no choice but to deal through this agent. All this the court's opinion patly demonstrates. Certainly the principle is not so salutary it must be vindicated by visitation upon an unoffending contractor.

A covenant of a contract is a pledge—something "more than a promise, and lesse than a Oath"—to perform or respond in damages. The bargain good or bad, the United States faithfully keeps her covenants.

REED, *Justice* (Ret.), sitting by designation, dissenting:

The court finds in *Muschany* v. *United States*, 324 U.S. 49, 66–67, a precedent for upholding the validity of the present contract. Corruption as a basis for the invalidation of a government contract is considered neither in the *Muschany* case nor in this case. Both cases turn on whether the conduct was in violation of public policy and therefore void.

The court cites, in support of its position, the conclusion reached in the *Muschany* case that a contract to be invalid as a violation of public policy must be "so menacing as to prohibit such contracts regardless of the effect in a particular case." The *Muschany* case calls for maintenance of contractual obligations of the United States unless a dominant public policy or a statutory enactment declares its invalidity.[3]

In the *Muschany* case, the Government purchased land through its own agent by a contract that allowed the agent cost plus a fixed fee, a method specifically approved by a statute, The National Defense Act of 1940.[4] In this present case now under consideration, there is a dominant public policy against a negotiator with a conflict of interest which

---

[3] *Muschany* v. *United States*, *supra*.

[4] 54 Stat. 712; *Muschany* v. *United States*, *supra*, pp. 66–67.

is embodied in a statutory enactment punishing such conduct as criminal.[5]

In such situations a contract made in violation of the criminal statute is unenforceable. Accepting the argument of the majority that no improper motive influenced any action of Mr. Wenzell does not in our opinion make the Mississippi Valley contract valid. If contracts are made in violation of positive law, they are unenforceable.[6]

The Supreme Court of the United States approved that rule many years ago in the *Bank of the United States* v. *Owens*, 2 Peters 527. There the charter of the bank provided a limitation of six percent upon its loans or discounts. It was held that more was taken. The charter, however, did not provide that a contract for a greater sum was void. The court declared the answer was obvious; an unlawful contract could not be enforced, and decreed no recovery.

Again in *Miller* v. *Ammon*, 145 U.S. 421, recovery on a bill for a sale of liquor without a valid license was denied, the Supreme Court holding:

> The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. * * * And in *Harris* v. *Runnels*, this court, after noticing some "fluctuations in the course of decision, and observing" that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so," added: "It is true that a statute, containing a prohibition and

[5] See note 7, *infra*.

[6] 6 Williston on Contracts (Rev. Ed., 1938), § 1763:

"For the protection of the public, or for purposes of taxation, or for both reasons, many statutes are enacted forbidding certain bargains and sales either altogether or unless certain statutory regulations are complied with. There can be no doubt that if a statute directly prohibits a contract or sale it cannot be enforced by the parties to it, and the same is true if the formation or performance of the bargain is declared to be a crime. The imposition of a penalty is at least prima facie an implied prohibition of the transaction to which the penalty attaches. On the other hand, even though no penalty is imposed, the transaction may nevertheless be invalidated." The text is supported by numerous cases. See *Berka* v. *Woodward*, 125 Cal. 119; *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 334.

a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." Pages 426–27.[7]

This court has strongly supported the application of the rule against the validity of contracts where an officer or agent of the United States participates in their adoption. In *Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258, a suit on an implied contract to pay for the Government's use of a patent was dismissed on the ground of an interest in the contract by the Public Printer responsible for its use. This court said, page 271, referring to section 1783, Revised Statutes, the forerunner of 18 U.S.C. § 434, the section the Government relies on here:

> * * * section 1783, *Revised Statutes*, forbids any person directly or indirectly interested in the pecuniary profits or contracts of a commercial corporation acting as an officer or agent of the United States for the transaction of business with such corporation. It is not clear that by the alleged transfer to his sister-in-law of his stocks in this and other concerns Mr. Benedict intended to deprive himself of all ownership therein. Certainly the statement that his purpose was to give the full benefit of the stock in plaintiff corporation to his brother in case the latter was able to repay him the advances he had made is inconsistent with an absolute transfer of his stock to his sister-in-law, because, if it was hers, he could not give his brother the benefit of it, even if the advances were repaid. Certain it is that Mr. Benedict regarded himself as equitably entitled to compensation out of the corporation's receipts, and he says as much.

See *Rankin* v. *United States*, 98 C. Cls. 357, which is in accord. Compare *Architects Building Corp.* v. *United States*, 98 C. Cls. 368, 380, where a ministerial act, signing a contract, was held permissible under Revised Statutes 1783. This court said, page 380:

[7] The Restatement of the Law of the American Law Institute is in accord. It recognizes, too, that where refusal to enforce or rescind a bargain would produce a harmful effect on parties for whose protection a statute was passed, the illegal contracts may be enforced. A.L.I. Contracts, §§ 580 and 601.

> We believe this is one of the exceptions to the general rule. It was not the intention of the statute to cover a case of the nature of the instant case where the action of the President of the Corporation, who happened to be an agent of the Government, was solely for the purpose of officially signing the lease or voting on its acceptance, and where he took no part in the negotiations and derived no benefit, his actions being purely ministerial and in no way detrimental to the interests of the United States and transcended no public policy.

It appears that the English courts apply the same rules as to contracts in violation of statutes. In *Barton* v. *Piggott*, L.R. 10 Q.B. (1874) 86, a surveyor of highways, forbidden by statute to have an interest in a contract for work or materials, unless a license in writing was first obtained, had his accounts for such work subsequently approved by the appropriate justices who were authorized to approve beforehand. It was held unlawful to allow accounts declared illegal by another provision of the statute.

Pollock on Contracts (13th ed.), 275, phrases the present English rule in these words:

> (b) The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.
>
> These rules are established by the case of *Bensley* v. *Bignold*, which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute. It was argued that his right under the contract was untouched by the Act, which contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best, J. said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.
>
> Thus, for example, by the Court of Exchequer:
>
> "Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."

It is needless to discuss the "policy of the law" when it is distinctly enunciated by a statutory prohibition.[8]

Such unanimity of view as to the invalidity of contracts that violate specific statutory prohibitions brings us to an examination of the statute here in question. It appears below.[9] It was enacted to meet a specific menace to the fair negotiation of federal contracts and is akin to other statutory requirements to insure against corrupt influences, such as the requirement for statutory authority in the contracting officer or prior advertisement, or those that bar fiduciaries from profiting from dealings with their *cestui que* trust.[10] This section of the Code originated as Sec. 8 of An Act to prevent and punish Frauds upon the Government of the United States. It was enacted March 2, 1863, 12 Stat. 696, as a result of prolonged investigation and reports to Congress on the war contract frauds of that era.[11]

Government contracts are not only large in number and value but are negotiated by numerous contracting officers of varying ability and experience. The statutes for the protection of the Government are not because of frequent fraudulent influences but are to guard against the situations that may arise. They should be fairly interpreted so as to carry out their purpose to protect against a tendency to overreach the Government but are not to be extended to situations "not clearly within its terms."[12] In such cases as we have before us, it must be plain not only that, as we have shown above, the law makes illegal contracts that the statutes forbid, but that the questioned actions violate the statute.

Mr. Wenzell acted as an agent of the United States for the transaction of business with the business entity, which

---

[8] *Bensley* v. *Bignold* (1882), 5 B. & Ald. 335; 24 R.R. 401.

[9] 18 U.S.C. § 434:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[10] The Floyd Acceptances, 7 Wall. 666; *United States* v. *Ellicott*, 223 U.S. 524, 543; *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80; 332 U.S. 194. See Federal Conflict of Interest Statutes, 65 Harv. L. Rev. 955, 957.

[11] H.R. Rep. No. 2, 37th Cong., 2d Sess., Government Contracts, and Supplement.

[12] *United States* v. *Chemical Foundation*, 272 U.S. 1, 18.

transactions immediately resulted in a contract with the Atomic Energy Commission for the construction of generating facilities. The entity became the Mississippi Valley Generating Company. The words, "such business entity," were inserted in § 434 to insure that all types of business arrangements were included.[13] The fact that Mr. Wenzell received no salary from the Government but only reimbursement of expenses does not affect our conclusion that he was employed and acted as an agent of the United States in analyzing the cost of TVA's production of electricity for the Budget Bureau. This was to be compared with the cost of generation by private operators. To accomplish this analysis, Mr. Wenzell was furnished detailed information as to TVA operations, including costs.[14] The knowledge thus acquired was passed on to First Boston, his employer and a prospective agent for the sale of the private securities of the sponsoring company, in the fall of 1953, by Mr. Wenzell, although the Bureau had forbidden such disclosure as it was a confidential Bureau document. Finding 35. With First Boston's previous experience in a similar transaction with Ohio Valley Electric Corporation, Mr. Wenzell's company was well equipped to handle the financial affairs for any builders of the needed generating plant. Mr. Wenzell submitted his report to the Bureau of the Budget September 20, 1953. Finding 29.

Shortly thereafter steps were taken by the responsible officials of AEC and the Budget to negotiate with private power companies for furnishing the needed electricity. The Government considered it desirable to recall Mr. Wenzell for assistance in the negotiation. He was recalled and came in the middle of January 1954, as a Budget Bureau consultant, and worked for it in and out of Washington until April 3, 1954. Finding 106. His expenses for this period were paid sometimes by the Government, sometimes by First Boston. Finding 99. Mr. Wenzell consulted frequently in this period with the private sponsors of the construction plan as a representative of the Budget Bureau to work out a plan for private construction of the facilities. He was the

[13] H.R. Rep. No. 304, 80th Cong., 1st Sess., Sec. 434, A32.

[14] Findings of Fact 24 through 35, particularly 30.

only representative of the Budget Bureau at an important meeting on January 20, 1954. Finding 50. Various meetings followed concerning the sponsors' proposals in which Messrs Wenzell and Dixon, an active sponsor of Mississippi Valley, participated. Findings 50-67. The negotiators submitted a proposal to the AEC on February 25, 1954. This proposal was analyzed by the Budget Bureau, and Mr. Wenzell participated in the work. The conclusion was reached that the sponsors' proposed cost was too high.[15] The sponsors revised their cost estimates after various contacts with Mr. Wenzell. The Budget asked him to see Seal, a sponsor's representative, about new figures. He did so. Finding 84. He discussed the sponsors' offer with the sponsors' representatives, Messrs. Dixon and Yates, at a meeting with a senior officer of First Boston on March 10, 1954. Finding 86. During the period between the first and second proposals, there were several telephone calls and meetings between Wenzell and the sponsors' representatives concerning these proposals.[16] Later, at a general discussion at which Mr. Wenzell was present, the sponsors were told they were close "to submitting acceptable figures." Findings 97-98. Their formal proposal dated April 10, 1954, was made to the AEC on April 12 at Washington. This was done after a conference that morning with First Boston over the cost of the necessary construction money, some one hundred million dollars, at which Mr. Wenzell and other First Boston officials, including the Chairman of the Executive Committee, were present. Finding 107. On that date "Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal." Finding 108. The April 10th proposal was accepted by AEC as a "Satisfactory basis" for the negotiation of the contract finally concluded on November 11, 1954. Findings 129-131.

These facts establish, we thing, that Mr. Wenzell was an employee of the United States participating in the transactions that culminated in the contract in question within the terms of § 434 of Title 18, U.S. Code. But before the con-

[15] Findings 60-100, particularly 89-90.

[16] Findings 87, 89, 90, 92, 94.

tract should be declared unenforceable under the section in question, it must also be established that the agent was "an officer, agent, or member of, or directly or indirectly interested in the pecuniary profits or contracts" of the business entity with which he transacts business for the Government, that is, the sponsors who became the Mississippi Valley Generating Company. We think he was directly interested, within the meaning of the statute, in the contract of Mississippi Valley with AEC. His negotiations were with the sponsors of the business entity that made that contract.

The majority opinion, we think, misjudges the thrust of the statute. It argues that it is not shown that First Boston had an interest in the contract as financial agent or otherwise until after Wenzell's governmental employment had terminated. Assume that fact as true. The defense to this suit is not that First Boston violated § 434, but that Wenzell did.

The statute covers a person, not an officer, agent, or member of the Mississippi Valley business entity who is indirectly interested in the contracts of that business entity and acts as an agent of the United States for the transaction of business with such business entity. This covers Mr. Wenzell's situation.

Mr. Wenzell was a Vice President of First Boston receiving a salary and a bonus based upon the amount of business he brought the firm. Finding 125. If solely or partially through his contacts with the officials of Mississippi that business entity was induced, persuaded, or found it convenient to employ First Boston as its agent to "place the debt" of Mississippi with bond buyers, Mr. Wenzell could confidently expect recognition from First Boston.

The exact date of the contract between the Mississippi Valley business entity and First Boston on financing does not appear in the record. It was apparently at the meeting in Boston on April 12, 1954, to consider the submission of the sponsors' new proposal that arrangements were made. Findings 116 and 124. The retainer facts appear in detail in Findings 107–128.

The action of First Boston in refusing a fee for its services in the loan was predicated on the advice of counsel as to the

questionable legality of Mr. Wenzell's dual role as government negotiator and official of the financial agent of Mississippi Valley. First Boston, at an executive committee meeting, October 21, 1954, decided not to accept compensation for its services, except out-of-pocket expenses, because the company thought the financing had flowed directly from the offer of Mr. Wenzell's services to the Budget by First Boston's President, Mr. Woods. Finding 117. It had been determined in May preceding that the fees would be split 60% to First Boston and 40% to Lehman Brothers. Finding 115. First Boston's fee for the OVEC financing, a transaction akin to this one was \$150,000, plus \$20,000 expenses. Finding 27. Apparently the question of waiving a fee came up in First Boston's Executive Committee meeting of July 1, 1954. No action was then taken. Until November 17, 1954, after the contract between Mississippi Valley and AEC was signed, neither Lehman Brothers nor any representatives of the sponsors "had notice of First Boston's attitude regarding the charging of a fee." Finding 117. But whether the financing was to be without compensation or not, First Boston considered it a valuable feather in its cap to be in the "senior position" of such a large financial transaction. Finding 113.

The problem raised by Mr. Wenzell's activities in connection with his representation of the United States in its negotiations with Mississippi was not new on July 1, 1954. Both the First Boston and Mississippi Valley sponsors had had the matter brought to their attention. Prior to the time the first proposal of the sponsors was submitted to the Budget and AEC, February 25, 1954, the sponsors' counsel advised Mr. Dixon of the possible conflict of interest because of Mr. Wenzell's representation of the Government, if First Boston was asked to handle the financing. Mr. Dixon immediately spoke to Mr. Wenzell about the matter. Finding 68. A similar warning also came to Mr. Wenzell from members of the Budget Bureau staff during Wenzell's participation in the negotiations concerning the second offer of the sponsors. Finding 76. Mr. Wenzell spoke to Mr. Hughes of the Budget about the possible conflict question raised by the sponsors of Mississippi Valley. He advised him to talk to

counsel and then to the Director of the Budget. Mr. Wenzell then talked with Mr. Coggeshall, the President of First Boston who told Wenzell to take it up with First Boston's counsel, Sullivan & Cromwell of New York. On February 26, 1954, the day after the sponsor's first proposal to the AEC, Mr. Wenzell was advised by Sullivan & Cromwell to resign "forthwith and in writing" from the Budget Bureau. He was "also advised that if the proposal was later accepted and First Boston was requested to handle the financing the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee." Finding 72. Mr. Wenzell did not resign immediately, nor ever in writing, but continued to negotiate for the Government on the new contract with the sponsors and First Boston, as shown above. No explanation has been offered of the failure of Wenzell to resign promptly after his attorney advised him to do so on February 26, 1954, nor as to why, after being advised of the possible charge of conflict of interest, as set out in unchallenged findings 78 and 79, he continued to attend meetings in the Budget Bureau where the sponsors' offers to the Government were discussed and analyzed. For us these facts show a complete indifference to an obvious conflict of interest in violation of 18 U.S.C. § 434.

The steps taken by Mr. Wenzell between the first unsatisfactory proposal of the sponsors of the Mississippi Valley contract and the proposal that ripened into the contract, February 25 to April 12, 1954, appear to us to have been taken when his interest in securing the financial representation of the sponsors by First Boston was direct, positive, and looked useful to his financial advantage as helpful to his employer, First Boston. The acts were carried out with full advice as to their questionable character. They violated the words of the statute. Cf. *Waskey* v. *Hammer*, 223 U.S. 85.

That statute was intended to protect the public against participation in negotiations by civil servants with interests conflicting with those of the Government, to prevent abuses, and inspire confidence. The record shows that Mr. Wenzell's study of TVA operating costs and practices, and his

subsequent association with and advice to the sponsors of the Mississippi Valley contract negotiations were with the knowledge and approval of the Budget Bureau. This, we think, does not validate the contract. The Government has been fortunate in securing the services of many able Americans who serve without compensation but so long as they retain an interest in their respective companies, they cannot, under the statute, negotiate contracts with them for the Government. He may advise the Government as to business matters but he cannot act as an agent of the Government for the transaction of business with any business entity in which he has an interest. This is the public policy the criminal statute lays down.

We have here no problem of unjust enrichment of the Government without payment for the benefits furnished it by the Mississippi Valley Generating Company. To now say that the contract is invalid may seem harsh since the evidence does not disclose a payment or an express promise of direct financial benefit to Mr. Wenzell or the First Boston, but if the statute in question is to perform its intended function in the protection of the Government against prohibited actions that might influence contracts by public agents with private connections, courts must carry out the legislative purpose. The Government has vigorously defended this suit to recover damages for breach of contract on the ground of the invalidity of the agreement. We think the Government's position on that ground of public policy is well taken and the petition should be dismissed.

JONES, *Chief Judge*, dissenting:

I agree with the dissenting opinion of Justice Reed, but would add the following:

I would further emphasize the fact that the invalidity of the Power Contract does not rest upon the showing that it was entered into in bad faith, or corruptly, or for the purpose of perpetrating a fraud upon the Government. Nor do we have a criminal prosecution in which it is incumbent upon the defendant to establish criminal intent.

Rather, the issue is based on a principle older than this country itself, that no man who works for the Government may at the same time transact business with an entity in

which, directly or indirectly, he has a pecuniary interest. The maxim that a servant cannot faithfully serve two masters is an ancient one and is grounded on the frailties of human nature. The warning it carries is proven each day by experience. Where loyalty is divided, the devotion and singleness of purpose demanded of its fulfillment is missing. The maxim has special significance for the Government because of the high standards of ethical conduct which it exacts from its employees.

For many years Congress has been concerned with the possible evils resulting from a compromise of this fealty by Government employees. To guard against the damaging effects of fraud in its various forms—by striking at one of its prolific sources—Congress as early as 1862 enacted a "conflict of interest" statute. 12 Stat. 577. To make certain that it covered any agent of the Government, Congress amended the law on February 25, 1863. 12 Stat. 696. Since that time this law has undergone little modification. The policy it sanctions is one seeking to remove the temptation to violate the trust relationship of Government service. *Michigan Steel Box Co.* v. *United States*, 49 C. Cls. 421; *Rankin* v. *United States*, 98 C. Cls. 357. The legislation is thus directed at a temptation to commit wrong: Not the *fait accompli*.

The application of the statute is not defeated by a failure to establish deliberate fraud or corruption on the part of the servant who feels, or might feel, the nudge of interests adverse to those of the Government. Indeed, the contract may be disaffirmed without a showing that the Government suffered actual damages as a result of the activities of the employee concerned. The purpose of the statute, broadly phrased to curb evasion, is to prohibit the transaction of Government business by its employee with a business entity in whose profits or contracts he has a pecuniary interest whether it be direct or indirect.[17]

Did the activities of Adolphe H. Wenzell fall within the terms of 18 U.S.C. 434? I think so. To me it is inescapable in the light of the undisputed facts in this case that Wenzell was employed to act and did act as an agent of the United

[17] 18 U.S.C. 434.

States for the transaction of business with the Dixon-Yates group, the business being the prospective contract between the Government and the entity to be organized by the sponsors for that purpose.

The assertion that the numerous activities conducted by Wenzell to facilitate the contract sought by the sponsors were not the acts of an "agent of the United States for the transaction of business" does not comport with the facts. The record discloses what occurred in some but not in all the meetings and telephone calls between Wenzell and the Dixon-Yates group. At least we know that he procured and furnished to the Budget Bureau and to the sponsors information on the probable cost of interest on money to be borrowed by the plaintiff. Early in the inception of the project and before the sponsors' first proposal was submitted, it was well recognized by the officers of the Government, by the sponsors, and by Wenzell as well, that the interest rate on money borrowed by the utility company with whom the Government would contract would be an important element in the total cost to be paid by the Government. Findings 47 and 57. Therefore, the very matter to which much of Wenzell's effort was devoted was not only a part of the business being transacted with the Government but a vital element in it.

The majority seems to believe that the "interest" of Wenzell in the contract of the sponsoring group was so remote that it would not justify the invalidation of the Power Contract, but I view the facts differently. It must be remembered that Wenzell was not drafted by the Government. On the contrary, his employment as a consultant for the Budget Bureau was a direct outgrowth of the telephone calls made by the chairman of the board of directors of First Boston to Dodge and the resulting conference between the two men on May 11, 1953. Finding 24.

There is not the slightest doubt that the Dixon-Yates group was fully cognizant of the dual position of Wenzell. In fact, they were disturbed about it to the extent that they suggested that he resign in writing, but he did not do so, and they also knew that he continued to have an interest in the program. Could they have been more interested in avoiding the appearance of evil rather than the evil itself?

When large projects are involved there is always a tremendous drive for the privilege of handling and financing. It is highly competitive as it should be in a free economy. But this very fact makes it all the more important that the Government permit no unfair advantage as between competitors. They should all be on the same dead level of equality. This is an added reason for not permitting any interested party's serving in a dual capacity.

It is argued that Wenzell had no connection with the performance contract, but only with the financing. But they are as closely linked as the law of supply and demand. Very few one-hundred-million-dollar contracts can be performed without financing, and the financing of a large contract is an immensely profitable undertaking. Does anyone doubt that First Boston and Wenzell expected to finance the contract, and that Dixon-Yates expected them to do so?

Because of First Boston's experience in arranging for the financing of the project for the Ohio Valley Electric Corporation, the sponsors were well aware that if a contract resulted from their proposals, there was a strong probability that First Boston would be employed to handle the financing, and we may infer from the facts and circumstances in the record that this probability was equally well known to First Boston and Wenzell.

As a vice president of First Boston, he was entitled to a bonus on the business he brought to the firm and was greatly interested in a successful and expeditious closing of the Dixon-Yates contract, not only because of the fee First Boston would earn as financial agent but also because of the prestige it would gain in handling a transaction of such magnitude. While the record does not show that he served as a consultant in the Budget Bureau after April 3, 1954, he stayed long enough to learn that the sponsors' revised cost estimates were being favorably viewed by the Government and that a new proposal based on the revised figures would receive serious consideration. In addition, he did not regard his services with the Government as terminated until April 10, 1954, by which time the sponsors had drafted the second proposal and permitted him to review the provision in which he was most interested—the provision relating to interest rates on money to be borrowed by plaintiff.

The representatives of the sponsors were not novices in the handling of the proposed project with the Government. They were experienced businessmen who dealt in big figures and knew their way around. Clearly they were aware of the tremendous advantages of having a "friend on the inside." Otherwise, it is difficult to understand why they consulted Wenzell so frequently.

Finally, the argument that Wenzell's services with the Budget Bureau had no influence whatever in the retainer of First Boston as financial agent is, it seems to me, completely refuted by the statement of the chairman of the board of First Boston. He declared that the firm's decision not to charge the sponsors a fee was dictated by the fact that the retainer of First Boston by the sponsors had resulted directly from his conversation with Dodge in May 1953, when Wenzell's services were offered to the Budget Bureau. Finding 117.

In the conclusion reached by the majority, considerable reliance is placed on the Administration's unflinching and hurried insistence upon a contract with a private utility company; the diligence with which Wenzell pursued his duties in the Budget Bureau; the sponsors' awareness of Wenzell's duality and the disclosure of this situation to the Budget Bureau; Wenzell's departure before the actual drafting of the contract began, and the fairness of the resulting Power Contract.

This conclusion of the majority seems to stem from an understandable desire to avoid a harsh result in this case, but the difficulty I find with the majority decision is that the policy so clearly expressed in 18 U.S.C. 434 leaves no room for equitable considerations. To my mind, the policy means that in a situation such as that revealed in this case, the tendency or likelihood of a disadvantage to the Government invalidates the Power Contract. I cannot join in chipping out exceptions to a policy so forceably laid down by Congress nor agree that the conflict of interest statute means little when it says much. If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Wilson Cowen, and the briefs and argument of counsel, makes findings of fact as follows:

CONTENTS

I. THE CONTRACT

A. *General*

1. Plaintiff herein is Mississippi Valley Generating Company (hereinafter called MVG), a corporation organized under the laws of the State of Arkansas. Seventy-nine percent of the issued and outstanding stock of MVG is owned by Middle South Utilities, Inc. (hereinafter called Middle South), and the remaining 21 percent is owned by The Southern Company (hereinafter called Southern). Middle South and Southern are sometimes hereinafter referred to as the sponsors.

2. This suit was brought by MVG on behalf of itself and for the use of and benefit of 24 parties referred to as use-plaintiffs. The suit is based upon a contract, hereinafter called the Power Contract, entered into between MVG and defendant, acting through the Atomic Energy Commission (hereinafter called AEC), under which MVG agreed to construct and operate a steam electric generating station and related facilities at West Memphis, Arkansas. The Power Contract and certain supplemental agreements were duly executed and delivered on November 11, 1954. The contract and annexed interpretative and explanatory document were

received in evidence as plaintiff's exhibits 2–8, 11, and 15. These exhibits and all other exhibits referred to herein are by such references incorporated in these findings.

3. The Power Contract resulted from the following:

(a) On April 10, 1954, Middle South and Southern submitted to the AEC a proposal wherein the sponsors agreed to organize a new corporation (MVG), which would construct and operate the plant and other facilities in accordance with the terms of the proposal. For Middle South the proposal was signed by its president, Edgar H. Dixon, and for Southern by J. M. Barry, chairman of Southern's executive committee;

(b) on June 30, 1954, AEC wrote the sponsors that the proposal constituted a satisfactory basis for the negotiation of a definitive contract and that AEC was ready to begin negotiations; and

(c) on July 7, 1954, the parties began negotiations which terminated with the signing of the Power Contract on November 11, 1954.

4. Middle South is a public utility holding company which owned 100 percent of the stock of the Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company, and approximately 96 percent of the common stock of New Orleans Public Service Company. Dixon was a director of each of these four subsidiaries of Middle South, and he also became president of MVG when it was organized.

Southern is a public utility holding company which owned 100 percent of the stock of Alabama Power Company, Georgia Power Company, Mississippi Power Company, and Gulf Power Company. Eugene A. Yates, at all times material to this action, was chairman of the board of directors of Southern.

5. Section 8.22 of the Power Contract provided in part as follows:

> *Effective Date:* The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to the Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed

during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

6. Items (3) and (4) of Section 8.15 of the Power Contract, referred to in section 8.22, provided as follows:

> The obligations of the parties hereunder shall be subject to the following:
>
> * * * * *
>
> (3) the receipt by the Company of an opinion of the General Counsel to the AEC to the effect that the AEC has power and authority to execute this contract and the undertakings herein described and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the persons executing and delivering this contract on behalf of the AEC have full power and authority to do so; and
>
> (4) the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress.

7. (a) The opinion of the General Counsel to the AEC dated November 11, 1954, was rendered and delivered to plaintiff.

(b) On November 13, 1954, the Joint Committee on Atomic Energy adopted a resolution waiving the 30-day period specified in Section 164 of the Atomic Energy Act of 1954. However, as is more fully set forth in findings under the heading of "The Waiver Defense", the Joint Committee on Atomic Energy adopted a resolution on January 28, 1955, revoking the waiver.

(c) The opinion of the Comptroller General of the United States was embodied in two opinion letters dated October 5, 1954 and December 13, 1954, respectively, and copies of these were delivered to plaintiff. The second letter was delivered on December 17, 1954.

8. Since December 17, 1954, the date of the delivery of the second opinion of the Comptroller General, was the last of the dates specified in section 8.22, the Power Contract became effective on December 17, 1954.

9. Because of the time which had elapsed prior to the execution of the Power Contract, a letter agreement was entered into between MVG and defendant on November 11, 1954, stating that if by February 15, 1955, the effective date of the contract had not occurred as provided in section 8.22 and valid regulatory approvals necessary in connection with the issuance of MVG's capital stock had not then been obtained, either MVG or the United States might terminate the Power Contract by written notice without liability of either party to the other. By an exchange of correspondence during the period from February 11 to February 28, 1955, it was agreed that those provisions of section 8.22 of the Power Contract that were covered by the letter agreement had been satisfied and that the Power Contract was effective. As a result, the letter agreement was no longer operative.

B. *Performance by Plaintiff*

10. Subsection 1 of section 8.15 of the Power Contract provided that the obligations of the parties would be subject to the receipt by plaintiff of regulatory approvals in form and substance satisfactory to it and necessary to enable it to perform its obligations under the contract or necessary to enable plaintiff to issue its equity and debt capital. On November 17, 1954, six days after the execution of the Power Contract, plaintiff filed with the Securities and Exchange Commission (hereinafter called SEC) an application for approval of MVG's equity financing. On February 9, 1955, after extended hearings in which there was vigorous opposition to plaintiff's application, the SEC entered an order authorizing plaintiff to issue and sell to the sponsors capital stock in the amount of $5,500,000. On March 14, 1955, this order of the SEC was appealed to the Court of Appeals for the District of Columbia, as more fully described herein under the heading of "Lack of Regulatory Approvals Defense."

On April 22, 1955, plaintiff filed an application with SEC for permission to issue and sell bonds and to make bank

loans. As of July 11, 1955, when defendant notified plaintiff that the Government proposed to terminate the contract, testimony had been closed in this proceeding before the SEC, plaintiff's proposed findings having been filed on June 20, 1955. In the hearing, plaintiff encountered strong opposition from the same parties who had opposed its application in the equity proceedings and had taken the appeal to the Court of Appeals. The issues raised by the opposition were substantially the same in both proceedings, and in view of the SEC order in the equity proceeding, plaintiff could reasonably expect favorable action from SEC on its application to sell bonds and make bank loans. However, because of the opposition encountered and the appeal referred to, it was also apparent that there would be some delay, to an extent not ascertainable, before authority would be finally granted to plaintiff to issue and sell its debt obligations.

11. The condition of subsection 2 of section 8.15 of the Power Contract was the execution and performance by institutional investors and banks of contracts and commitments providing for the sale to such investors of plaintiff's debt capital in a form satisfactory to plaintiff. Bond purchase and bank loan agreements in a form satisfactory to plaintiff had been entered into with insurance companies and banks before the Power Contract was terminated. Plaintiff advised AEC of this action and sent it copies of the bond purchase and loan agreements.

12. Both the bond purchase agreement and the bank credit agreement required that, at the time of each borrowing thereunder, an opinion of counsel be furnished to the effect that plaintiff had "obtained all orders, certificates, approvals, authorizations or consents of the Securities and Exchange Commission" to enable it to issue and sell bonds, or to borrow money and issue notes, as the case might be, and that "such orders, certificates, approvals, authorizations and consents are valid and are in full force and effect, the times (if any) prescribed by statutes or regulations for appeals therefrom or rehearings thereon have elapsed and none of them are the subject of any pending attack on appeal or by direct proceedings or otherwise * * *".

13. Under date of June 14, 1955, Ebasco Services Incorporated (hereinafter called Ebasco), the architect-engineer em-

ployed by plaintiff to design the power plant and act as construction manager, estimated that plaintiff's cash requirements would be $6,175,000 by December 31, 1955. It was also estimated that these cash requirements would increase rapidly each month thereafter and that by the end of June 1956, plaintiff's total cash requirements would amount to $27,-575,000.

14. If plaintiff had exhausted the equity capital of $5,-500,000 before the debt proceedings had been favorably concluded, it would have been necessary for plaintiff to discontinue work on the project unless (a) it could have persuaded the banks and insurance companies to waive the requirements of valid SEC approval of the debt financing, or (b) obtained temporary bank loans until approval was secured. However, both the appeal on the equity financing and the SEC debt proceedings became moot when defendant terminated the contract. The record affords no basis for making an accurate determination as to when the debt proceedings would have been favorably concluded. A finding that plaintiff would have had or that it would not have had funds available for the construction of the plant after the date of termination, would be speculative. Plaintiff did not encounter any problem of lack of funds before the contract was terminated. Of the $5,500,000 of capital stock which the SEC had authorized plaintiff to issue and sell, plaintiff had actually issued and sold to the sponsors stock in the amount of $1,100,000. By the date the contract was terminated, plaintiff had large outstanding commitments, but it had actually spent less than one-half of the $1,100,000.

15. Although all of the regulatory approvals required under the terms of the Power Contract had not been obtained by plaintiff as of the date of termination, the evidence shows that from the date the Power Contract was signed and until it was terminated, plaintiff was diligent in its efforts to obtain all of the required regulatory approvals.

16. Before the negotiations on the contract began, the defendant had made it clear to plaintiff that the proposed power to be generated at the new plant would be needed by the fall of 1957, and during the negotiations, plaintiff was told that the first of the three units of the power plant was

to be in operation within 32 months after the effective date of the contract.

In section 2.01 of the Power Contract, plaintiff agreed to use its best efforts to have the three generating units of the power plant ready for commercial operation not later than 32, 34, and 36 months, respectively, after the effective date of the contract. In view of the defendant's express need for the power by the fall of 1957, and in order to meet the target dates which were known long before the Power Contract was signed, the sponsors and plaintiff began activities looking toward performance of plaintiff's obligation under what eventually became section 2.01 of the Power Contract months before that document was executed. These early activities included taking options on land which was to be the site of the plant, primary engineering work, the preparation of a schedule of construction activities, and some exploratory work on the site.

By the end of 1954, plaintiff, through Ebasco, had made limited commitments for many of the items of equipment needed and for a construction office and warehouse.

In the early part of 1955, a construction office was opened at the site and major construction was started on June 1, 1955. By the time the contract was terminated, three of the basic construction contracts had been let and many of the purchase orders had been issued.

The record as a whole shows that at the time the Power Contract was terminated plaintiff had used its best efforts to comply with the obligation set forth in section 2.01 of the Power Contract.

17. Aside from sections 2.01 and 8.15 (covered by preceding findings), there were a number of provisions in the Power Contract and in the interpretative memorandum annexed thereto which imposed affirmative obligations upon plaintiff. The defendant offered no evidence that plaintiff had failed to perform any of the obligations set forth in these provisions. The undisputed evidence establishes that at the time the defendant terminated the contract, plaintiff had performed such obligations imposed upon it by the contract in all instances where performance was timely, or that it was proceeding diligently toward performance.

C. *Termination of the Contract*

18. Near the end of June 1955, plaintiff learned that the President of the United States had requested the Director of the Bureau of the Budget to confer with AEC and the Tennessee Valley Authority (hereinafter called the TVA) to determine whether to cancel the Power Contract because of the decision of the city of Memphis to construct its own electric generating facility, thereby relieving TVA of the obligation to furnish Memphis with power.

19. On July 11, 1955, at about 5 p. m., plaintiff was advised by telephone by the Chairman of AEC that the President of the United States had decided to order termination of the contract. On August 1, 1955, the oral notice was confirmed in a letter from AEC to plaintiff. The letter expressed the hope that it would be possible for the parties to agree on a mutually acceptable basis for bringing the contract to an end.

20. On July 12, 1955, representatives of plaintiff met with the President of the United States, and thereafter there was a series of meetings with representatives of AEC. In compliance with a request from AEC, plaintiff supplied estimates of termination costs as of June 30, September 30, and December 31, 1955. During these meetings there were discussions about plaintiff's commitments to third parties and as to steps that could be taken to minimize the outstanding claims. Plaintiff also worked with AEC in attempting to settle some of the smaller claims. However, the representatives of AEC were unable to give plaintiff any specific instructions on actions that should be taken in connection with the termination of the contract. The AEC representatives stated that they had not received any directive regarding the matter. The post-termination discussions were broken off by AEC in October 1955, and on November 23, 1955, AEC wrote plaintiff that upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government.

21. From the date the Power Contract was executed until the letter of November 23, 1955, no representative of the defendant had indicated to plaintiff that it had failed in any way to discharge its obligations under the contract. How-

ever, at the meetings between plaintiff and the AEC after the contract had been terminated, AEC reserved the question of whether the contract was invalid because of a conflict of interest. This is the basis of one of defendant's affirmative defenses, the facts regarding which are set forth under the heading "Conflict of Interest Defense."

II. THE CONFLICT OF INTEREST DEFENSE [1]

A. *Eisenhower Administration's Power Policy in 1953 and 1954*

22. It was the basic Eisenhower Administration policy on power during 1953 and 1954 that the Government would seek to have either private enterprise or local communities provide power generating sources in partnership with the Government. This policy was first announced in the President's State of the Union Message of February 2, 1953.

23. In accordance with the Administration policy and in furtherance of its objective to reduce the budget, Joseph M. Dodge, Director of the Bureau of the Budget, eliminated from the TVA budget for the fiscal year 1955 a request for funds for the construction by TVA at Fulton, Tennessee, of a steam generating plant which was to serve the commercial, industrial, and domestic power needs of the city of Memphis and its environs. TVA's request for a similar appropriation in the budget for the fiscal year 1953 had been disallowed by the Truman Administration, but it had been included in the budget for the 1954 fiscal year, which President Truman left with Congress when the Eisenhower Administration took office. In March 1953 during his review of the then pending budget, Dodge disallowed the request for the fiscal year 1954. In the spring of 1953 and again in 1954, efforts to add an appropriation for the TVA Fulton plant were defeated in Congress.

B. *Wenzell's Work in Budget Bureau in 1953*

24. Through three telephone calls he made early in May 1953, George D. Woods, chairman of the board of directors of First Boston Corporation, obtained an appointment with

[1] Paragraph 24 (A) of defendant's answer.

Dodge on May 11, 1953. First Boston is and was one of the leading investment banking concerns in the country. It underwrites security issues for both private and governmental entities. When the two men met in Washington, D. C., on the afternoon of May 11, Woods stated that he had read the published announcements of the Administration's policy of reducing the Government's participation in business activities, that he was wholeheartedly in accord with the policy, and that if there was anything which he or his firm could do to further the policy, they were ready and willing to be of service and assistance. Dodge, who had not been in office very long, was interested in having some power studies made, particularly for the purpose of ascertaining the subsidy the Government was providing to TVA. He had not been able to find the individual he thought appropriate to make the study and asked Woods for a suggestion, stating that the Bureau needed the services of a man who had worked on utility financing transactions and was experienced in accounting and money costs. Woods replied that First Boston had such a man, Adolphe H. Wenzell, an engineer who had worked on many utility financing transactions and was qualified for the undertaking. Woods agreed to ascertain if Wenzell could be made available.

25. Upon his return to New York, Woods discussed the matter with Wenzell and found that he was willing to undertake the assignment. Woods also talked with his principal associates, James Coggeshall, Jr., president of First Boston, and Duncan Linsley, chairman of the corporation's executive committee, and learned that they had no objection to Wenzell's services being made available to the Bureau. Thereupon, Woods telephoned Dodge and made arrangements for Wenzell to meet Dodge on May 15, 1953.

At the time, Wenzell was one of 40 vice presidents of First Boston and one of its numerous directors. He had been employed by First Boston since its inception in 1934 and had been with its predecessor since 1923. Wenzell was an engineer, specializing in utility matters and serving in the buying department of the corporation. This department was concerned with investigations and negotiations

leading up to an undertaking by First Boston to underwrite securities. His entire business life and experience had been devoted to this type of work. At times, he supervised and personally conducted investigations of utility properties and the soundness of the management for the purpose of obtaining information that would enable First Boston to determine whether it should be identified with any financing for the company under investigation. He was regarded as an expert in this field.

26. Pursuant to the arrangements made, Wenzell met Dodge in the latter's office in Washington on May 15, 1953. Dodge talked with Wenzell about his experience, background, and the nature of the work to be done. From this and from a preliminary investigation he had made, Dodge was satisfied that Wenzell could perform the desired service. Accordingly, it was agreed that Wenzell would act as a consultant to the Bureau of the Budget on a part-time basis, spending one or two days a week in Washington at the Bureau, and then returning to First Boston's office in New York City to resume his work there. Wenzell was to serve without compensation; but it was agreed that he would be paid $10 per day in lieu of subsistence and that his necessary transportation expenses would be paid by the Government through the use of transportation requests which were furnished to him for that purpose. It was understood that he would not sever his connection with First Boston and that he would continue to receive his regular salary from it. Dodge instructed Wenzell to make a commercial, financial analysis of TVA, including a summary of its development and a comparison of its accounting and financial practices with those of privately owned utility companies—all with the ultimate objective of estimating the amount and showing the sources of the Government's subsidy to TVA. Dodge emphasized that he did not want an audit, an engineering examination, or a survey of TVA properties.

27. TVA is a very large supplier of electrical energy to the AEC. However, the AEC also purchases huge amounts of energy from private suppliers. One of these suppliers is the Ohio Valley Electric Corporation (hereinafter designated as OVEC), composed of a group of private utilities which, in 1952, contracted with AEC to supply it with

1,800,000 kw. at Portsmouth, Ohio. This is one of the largest generating plants in the world, and a large amount of financing was required by the utilities that banded together to carry out this undertaking.

First Boston was employed by OVEC to arrange for this financing, consisting of directly placing the securities of OVEC with large institutional investors. It did so, and received a fee of $150,000 for its services, plus $20,000 for expenses.

The OVEC transaction was substantially completed in 1952, but in 1953, when Wenzell was first employed by the Budget Bureau, First Boston was performing some services in connection with the OVEC project.

28. Wenzell began work in the Bureau on May 20, 1953, and was introduced to the staff of the Resources and Civil Works Division, which handles the budget and legislative work relating to the Departments of Agriculture and Interior, the Federal Power Commission, TVA, and other agencies. Dodge had told Wenzell that he was to use TVA reports as the basic documents for the study, but the staff of the Resources and Civil Works Division was instructed to provide him with any additional information he needed for that purpose.

29. Wenzell completed his assignment and submitted his report to Dodge about September 20, 1953. Between May 20, 1953, and the date the report was delivered, he made 11 trips to Washington and spent 29 days in the Bureau. On his first trip from New York on May 20, 1953, First Boston paid his transportation expenses, but the Government paid such expenses thereafter. During this period, he received $10 per diem from the Government for subsistence. He also submitted supplemental vouchers to First Boston for his subsistence expenses, and these were duly paid.

30. In the course of Wenzell's study, a considerable volume of written and printed data was made available to him by the Bureau staff. The material included TVA annual reports, General Accounting Office reports of TVA audits, TVA financial statements, material presented to the Bureau by TVA in justification of its budgets, a report on TVA's proposed electric generating plant at Fulton, a statement of tax equivalents paid by TVA, and the like. He also had

discussions with one or more members of the staff on the financial status of TVA.

31. On August 31, 1953, Wenzell met with members of the Bureau staff and discussed generally his conclusions on his study of TVA operations. His comments regarding TVA operations were favorable but he stated that, in his opinion, not enough of TVA's hydroelectric power costs were charged to power. He also expressed concern about any further expansion of TVA's service area.

While he worked at the Bureau during this period, Wenzell was assigned an office next to that of Rowland R. Hughes, the Assistant Director of the Bureau of the Budget. Before Wenzell's report was completed, he showed it to Hughes, who made several suggestions regarding it.

32. Wenzell's report consisted of a concise summary of TVA operations, a comparison of its power system operations with those of private power companies, and a statement of the fiscal problems to be faced if future power requirements in the area were to be supplied by TVA. His report, in evidence as defendant's exhibit 10, was accompanied by his conclusions and recommendations, including the following:

(a) the electric generating capacity and annual power output of TVA is the largest in the country;

(b) the original purpose and program of the TVA, i. e., the hydro development of the Tennessee River Basin, was nearing its end;

(c) since 1951, TVA had been changing from a predominantly hydroelectric operation to a steam electric operation, because of the completion of the unified steam development program and a tremendous increase in the demands for power caused by TVA's efforts to supply a large portion of AEC's requirements;

(d) in addition to costs that properly belong to navigation and flood control, TVA had allocated an additional substantial portion of the cost of multiple-use facilities to navigation and flood control, whereas these costs should have been allocated to power operations;

(e) a comparison of the assets and revenues used by TVA for calculating payments made by it in lieu of general or local taxes with similar assets and revenues of 14 adjacent

private power companies showed that TVA paid only 50 percent as much general and local taxes as the private companies;

(f) on the basis of the true costs to the Government of long-term money, the deficiency in the earnings of the power division of TVA for the year ended April 30, 1953, was a substantial sum; this sum was a Government subsidy.

Among the alternative suggestions for future power supply to the TVA service areas were the following:

(a) the municipalities or cooperatives by themselves, or as a group, should have the right to construct steam plants to supply their expected load growth;

(b) the need for additional power in the area could be supplied by wholesale steam generating companies, which would sell the power to TVA under long-term contracts, and TVA would then distribute the power through its transmission network in the area;

(c) municipalities and cooperatives around the periphery of the service area could be served by adjacent power companies, but this idea was contrary to public utility practice and policy.

He also wrote that in order for TVA to escape the dilemma of being primarily interested in navigation and flood control on one hand and being forced into the steam power business on the other, TVA should retain ownership and control of all of the multiple-use dams and other navigation and flood-control facilities but the balance of its power system assets should be transferred to a fully taxpaying corporation, the entire capitalization of which, in the first instance, would be owned by the Government. The new corporation would purchase the entire output of power at the dams at a price which would include equivalent local taxes, interest at a rate equal to the cost of long-term Government money, and amortization of cost over a long period of time. All future capital requirements for expansion would be obtained through the sale to the public of regular corporate security issues without any kind of Government guarantee, and a definite program would be established to liquidate all of the Government-owned securities by sale to the public. In his report, Wenzell concluded that the adoption of this plan would accomplish the objective of getting

the Government out of the subsidized power business without surrendering any measure of control over navigation and flood control in the Tennessee River Basin.

33. When Wenzell's report was delivered to him, Dodge went over it briefly but did not read it carefully until later. Dodge never adopted or used any of the recommendations made in the report, nor did he consult Wenzell on any policy matters connected with the budget. Since he had not requested Wenzell to include recommendations in his report, Dodge was surprised to see them and they did not impress him. Wenzell's recommendations were not a factor in the policy decision, later communicated by Dodge to Strauss, that the AEC should enter into a contract with the utility companies.

On October 19, 1953, Dodge wrote Wenzell, expressing appreciation for the work Wenzell had done and stating that the report "was an extremely valuable contribution, not only for the material contained in it but its use as a foundation for further studies in consideration of the same subject." The letter also stated that the report "has been examined by two important individuals whose reaction to your work equal my own." The individuals referred to were President Eisenhower and Ex-President Hoover, who were given copies of Wenzell's report.

34. Neither the Chairman of AEC, its General Manager, nor its Deputy General Manager, who was responsible in AEC for the discussion and development of data that led to the decision to negotiate the Power Contract and who headed the AEC group in negotiating the contract, had seen or were aware of Wenzell's report until four months or more after the date of the execution of the Power Contract.

35. When he handed his report to Dodge, Wenzell asked permission to retain a copy. Dodge agreed that since Wenzell was the author, he could have a copy on the condition that it would not be shown to anyone else since it was a confidential Bureau document. However, in the fall of 1953, after Wenzell had completed his assignment and had resumed his regular work in First Boston, Woods asked Wenzell for a copy of the report made to Dodge. Wenzell gave his copy to Woods, who read it over the weekend and returned it with the comment that Wenzell had done a good

job. Neither Wenzell nor Woods received permission from anyone in the Bureau for Woods to read the report.

C. Development of Plan to Secure Power From Private Sources in Lieu of TVA Fulton Plant

36. As previously stated, the Budget Bureau had decided in the fall of 1953 not to include any provision in the budget for the fiscal year 1955 for the TVA projected steam plant at Fulton, Tennessee. The reasons for this decision, as subsequently stated by Hughes (defendant's exhibit 88), were:

(a) It was imprudent to embark upon a construction program requiring expenditures of one hundred million tax dollars in fiscal years 1955, 1956 and 1957 at a time when government borrowing was verging on the debt limit;

(b) both the Senate and House of Representatives, in considering TVA appropriation bills in the previous session of the Congress, had rejected amendments to provide funds for starting construction of the Fulton steam plant, and

(c) there was pressing need to explore the farreaching implications of a Federal policy of spending Federal tax dollars for Federal steam plants to meet the power needs of this particular region and, if decided upon, to explore the impact of such a policy throughout other regions of America.

In a discussion with congressional leaders, Dodge had been told that if a request for funds for construction of the TVA plant in Fulton should be included in the budget, the request would not be approved by Congress.

When Gordon Clapp, the General Manager of TVA, learned of the decision during the fall of 1953, he informed representatives of the Bureau of the Budget that if provision for the Fulton plant was eliminated from TVA's budget, TVA would take the position that the power then being furnished by TVA to AEC should be reduced so that a like amount of power would be available to TVA to meet the growing needs of its other customers. TVA was then under a firm contract with AEC to supply its Paducah, Kentucky, installation substantially the entire output of TVA's generating plant at Shawnee, Kentucky, near Paducah. TVA was also supplying a large block of power

to the AEC installation at Oak Ridge, about 360 miles east of West Memphis, Arkansas. As a result, the Bureau of the Budget began drafting a statement for the President's budget message to the effect that an attempt would be made to relieve TVA of some of its power load to AEC and that if this did not prove to be practicable or successful, the matter of the construction by TVA of a plant at Fulton would be reconsidered.

37. On December 2, 1953, Dodge met in his office with Lewis I. Strauss, Chairman of the AEC, and Walter J. Williams, then AEC's General Manager. Dodge stated that it was desirable to avoid capital expenditures for new TVA steam generating capacity and that the Budget Bureau had considered that this objective could be accomplished by having AEC contract with private industry to construct a plant that would supply 450,000 kw. of additional power for AEC at its Paducah, Kentucky, installation by 1957, and by having AEC release a like amount of power which TVA was then supplying to it so that the released power would be available for TVA's other requirements. Dodge referred to Electric Energy, Inc. (hereinafter called EEI) and OVEC, two different groups of private utility companies which had previously entered into long-term power contracts with AEC to build steam generating stations and to supply power to AEC at its installations in Paducah, Kentucky, and Portsmouth, Ohio. Dodge inquired whether the plan outlined by him would be feasible, whereupon Williams stated that the answer to the question would require discussions with J. W. McAfee, president of Union Electric Company and also president of EEI.

After the meeting, Williams arranged to meet McAfee, who had been helpful in arranging for the construction by EEI of a plant at Joppa, which was then being completed to furnish AEC power at its Paducah installation. When McAfee met with Williams on December 8, 1953, Williams asked whether EEI or some similar corporation would be interested in building a plant to supply AEC with as much as 450,000 kw. of generating capacity by the middle of 1957. McAfee stated that it would be difficult for EEI to add generating capacity at Joppa and suggested either a plant upstream from Cairo but downstream from the Joppa plant,

or a plant near the town of Shawnee. He agreed to make some inquiries about the matter. Later, on December 14, 1953, Williams telephoned McAfee, requesting that the latter write the AEC and indicate his interest in furnishing the generating capacity mentioned on December 8. On December 14, 1953, McAfee wrote the requested letter, stating that he thought a group of private investors could be formed to supply AEC the amount of power requested at its Paducah project upon substantially the same rates and terms as provided for in the contract between AEC and EEI. Williams had earlier cautioned McAfee to make only general inquiries and not to disclose the particular project under discussion. Accordingly, in his letter, McAfee stated that when he received more specific information he would be in a position to discuss the project with financial institutions and prospective members of a managing group so that more definite information could be supplied.

A copy of McAfee's letter was sent to William F. McCandless, Assistant Director for Budget Review in the Budget Bureau, who had been told of the meeting with McAfee and had requested a copy of the letter in order that he might show it to Dodge. The Budget Bureau's interest in any proposal which might be submitted by McAfee's group was twofold: first, the Bureau was concerned with relieving the burden on the budget of the large capital outlay required for building additional facilities for TVA; second, in such a transaction, the Budget Bureau acts as the Administration's mechanism to make certain that the project is defensible. Dodge realized that the Budget Bureau would later be called upon by both the White House and a congressional committee to give an opinion about the project.

38. On December 17, 1953, Hughes met with Gordon R. Clapp, Chairman of the Board of TVA, and with members of the staffs of the Budget Bureau and TVA. At this meeting, Clapp was informed that no money would be included in the 1955 budget to provide new steam plants for TVA but that arrangements were being made to reduce by the fall of 1957 existing TVA commitments to AEC by some 450,000 kw., thus providing TVA with power for reasonable growth in industrial, municipal, and cooperative loads through 1957. At Clapp's request, it was agreed that an

attempt would be made to relieve TVA of a minimum of 500,000 kw. and that this amount would be increased to 600,000 kw. if possible. Clapp was told that if negotiations for furnishing the AEC load requirements from other sources were not consummated, the question of starting additional generating units in the TVA area would be reconsidered. On the following day, December 18, 1953, the statements made to Clapp were confirmed in a letter sent to him by Dodge.

After December 17, 1953, Dodge delegated responsibility for carrying on the project to Hughes, and thereafter Dodge's connection with the matter became less and less frequent. He resigned on April 15, 1954, and was succeeded by Hughes.

39. Sometime prior to December 14, 1953, Dixon learned from McAfee that AEC might be seeking an additional source of power in the Paducah area. Dixon was interested in the information for two reasons: (1) the potential sale of electric power, and (2) his feeling that his company should make a contribution to the effort of supplying the electric power needs of the Government through investor-owned power companies rather than through publicly-owned power companies.

On December 23, 1953, Dixon met in Strauss' office with Williams, Strauss, and Kenneth D. Nichols, who had been selected to succeed Williams as General Manager of AEC when the latter resigned on January 31, 1954. The purpose of the meeting was a discussion about having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to AEC there. There was also a discussion about the power situation in the Tennessee area, and there were maps indicating the power loads and utility plants in that area. Dixon referred to and produced a copy of a letter which Mississippi Power & Light Company, one of the subsidiaries of Middle South, had written to TVA under date of October 15, 1953, proposing to supply to TVA for a term of 20 years a block of 450,000 kw. of power in lieu of the construction by TVA of its proposed Fulton plant, and for that purpose to construct near Memphis a plant which would deliver the power to TVA at the Tennessee State line.

On the same day, Williams telephoned McCandless at the Budget Bureau to inform the latter about the meeting. On the next day, Williams sent McCandless a copy of the letter which had been left by Dixon.

40. On December 24, 1953, Hughes, as Acting Director of the Budget Bureau, wrote to Strauss, stating that the Bureau understood that as a result of preliminary conversations between AEC and private interests, arrangements could probably be worked out to supply AEC at Paducah with 500,000 (and possibly up to 600,000) kw. more of electric power from non-Federal sources than AEC was then scheduled to receive by 1957 and that these arrangements would relieve TVA of its previous commitments to AEC in like amounts, freeing such power for normal load growths in the TVA area. He also stated that the TVA budget would be based on that expectation, but that if satisfactory arrangements could not be developed to provide such power for AEC installations from private sources, reconsideration would be given to TVA's request for appropriations to build additional power facilities. Hughes' letter expressed the understanding that the arrangements he referred to related solely to existing firm commitments for permanent power between TVA and AEC. The letter stated that it would be helpful if AEC would proceed with the negotiations with a view to reaching a firm agreement with private interests to supply the amount of power stated above by not later than the fall of 1957. Hughes requested that the Bureau be kept currently informed regarding the negotiations, because of the necessity of submitting supplemental appropriations to Congress during the following spring in the event the arrangements mentioned were not consummated.

41. On the basis of the opinion expressed in McAfee's letter of December 14, 1953, the section of the President's budget message relating to TVA was formulated and later released. In the message, which was delivered to Congress on January 21, 1954, the President stated as follows with respect to additional power plants for TVA:

> Although no appropriations are included in the 1955 budget for new power generation units by the Tennessee Valley Authority, expenditures will increase for continuation of construction of power plants presently un-

derway, and for operation of power plants after they are completed. Expenses for operation of flood control, navigation, and fertilizer facilities will continue at about the 1954 level. Expenditures for power and fertilizer operations are more than offset by the income from sales. In order to provide, with appropriate operating reserves, for reasonable growth in industrial, municipal, and cooperative power loads in the area through the calendar year 1957, arrangements are being made to reduce, by the fall of 1957, existing commitments of the Tennessee Valley Authority to the Atomic Energy Commission by 500,000 to 600,000 kilowatts. This would release the equivalent amount of Tennessee Valley Authority generating capacity to meet increased load requirements of other consumers in the power system and at the same time eliminate the need for appropriating funds from the Treasury to finance additional generating units. In the event, however, that negotiations for furnishing these load requirements for the Atomic Energy Commission from other sources are not consummated as contemplated or new defense loads develop, the question of starting additional generating units by the Tennessee Valley Authority will be reconsidered.

42. On January 4, 1954, McAfee wrote Williams, stating that since their discussion in Washington, McAfee was impressed with the necessity of considering other alternatives. He suggested the following, in order of priority, as a means of relieving the Federal budget of avoidable capital expenditures in the TVA area: (1) that TVA no longer assume full responsibility for supplying the needs of municipalities, and as existing contracts expired, that the municipalities which needed a greater supply of power than was available from TVA, be obliged to purchase power from others or construct municipal power plants; (2) that TVA arrange with neighboring power companies to buy power from them, and (3) the plan under discussion, i. e., a contract between AEC and private industry to supply power to AEC at Paducah.

Strauss was notified of the receipt of the letter, copies of it were distributed in AEC, and it was discussed in that agency.

43. On January 14, 1954, Hughes and McCandless attended a meeting in Strauss' office with Strauss, Williams, and Nichols. Reference was made to the two letters from Mc-

Afee and to the proposal which Mississippi Power & Light Company had submitted to TVA on October 15, 1953. Nichols pointed out to Hughes and McCandless that if AEC purchased more power from private utilities in lieu of the power being furnished by TVA under firm contracts with AEC, the cost to AEC would be greater and the supply less certain because of possible delays in the construction of the plant and the location of reserve power. He stated that McAfee was not eager to enter into such contract and that from an engineering point of view, Paducah was not the proper location for the new power plant, because if the AEC's needs there were reduced, it would be difficult and expensive to use the surplus power elsewhere. Finally, he suggested that if the power was needed in the Memphis area, it would be better for the city of Memphis or for TVA to enter into a power contract with private utilities to construct a plant in that area along the lines that had been suggested by Dixon and McAfee.

McCandless requested that the AEC pursue the matter further with McAfee.

After the meeting in Strauss' office, Williams arranged for McAfee and Dixon to attend a meeting in Strauss' office on Wednesday, January 20, 1954.

44. There is no evidence that Dixon, McAfee, or any representative of defendant had any contact with Wenzell during the period from November 1, 1953 to January 14, 1954. Neither McAfee nor Dixon knew of the report Wenzell made in September 1953.

D. *Preparation, Submission, and Review of Sponsors' Proposals, and Wenzell's Activities in Connection Therewith*

45. About the middle of January 1954, Hughes suggested to Dodge the advisability of requesting Wenzell to again assist the Bureau, because of Wenzell's study of TVA and his knowledge of commercial transactions. By that time, the Administration had decided that AEC should proceed to make a contract with private utility companies and that the TVA plant at Fulton would not be built. Dodge authorized Wenzell's return and thereafter, when Wenzell was working at the Bureau, Dodge saw little of him until March 1954.

The Bureau was concerned that any proposal which it considered met its fiscal standards, namely (1) that the cost of the power to be contracted for by AEC would be reasonable in relation to the cost of other power used by AEC, and (2) that the cost of power under any proposal could be reconciled with the estimated cost of power from the proposed TVA Fulton plant, taking into account the cost of interest and taxes paid by the private companies. Wenzell was to assist the Bureau again as a part-time consultant during the exploratory discussions on the project, particularly with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs.

46. In response to a telephone call made by Hughes on January 14, Wenzell met Hughes in Washington on January 18, 1954. Hughes told Wenzell that the Government had decided to have a private power company construct a large steam generating plant near Paducah, Kentucky, to supply approximately 600,000 kw. of power to the AEC in substitution for a like amount of power then being supplied to AEC by TVA in the same location. Hughes showed him a paragraph in the President's budget message reflecting the decision that had been made (finding 41); stated that meetings had already been held with the utility executives during the month of December, and said that another meeting at the AEC had been arranged for January 20 with Dixon and McAfee. Hughes emphasized the need for great speed on the project, and after learning that Wenzell knew both Dixon and McAfee, Hughes asked Wenzell to attend the meeting and to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter.

Wenzell had met Dixon about 1943. In 1948 or 1949, he had talked to Dixon in connection with services that First Boston proposed to render to Arkansas-Missouri Utilities Company, a customer of Arkansas Power & Light Company, one of Middle South's subsidiaries.

On the same day (January 18, 1954), Hughes made an appointment by telephone for Wenzell to see Strauss in order that Wenzell could learn further particulars about the meeting to be held on January 20. No mention was made at the

time about the cost of interest rates involved in financing the project.

47. During the afternoon of January 18, 1954, Wenzell went to the AEC building and had a very brief meeting with Strauss. All visitors at AEC were required to sign a "Visitor's Registration" card which contained a space for the name and address of the visitor and his "Organization". On that occasion and on each occasion thereafter when Wenzell visited the AEC, he specified his address as "100 Broadway, N. Y. City", which was the address of the offices of First Boston, and inserted "First Boston Corp." in the space specified for the organization. Wenzell did this to provide information as to where he could usually be found by anyone looking for him.

Wenzell told Strauss that he was there at the request of Hughes and was trying to get some background of the program and plan. Strauss had never met Wenzell before, and there is a conflict in the testimony of Wenzell and Strauss as to whether Wenzell stated he was connected with the Bureau of the Budget. The greater weight of the evidence shows that Hughes told Strauss that Wenzell was a banker connected with the First Boston Corporation as an officer or a partner, and that Strauss was to acquaint Wenzell with the background and purpose of the meeting to be held on January 20, 1954. Strauss assumed that Wenzell was to attend the meeting to advise all concerned on matters within his competence. Strauss was aware that the cost of money, i. e., the interest rate on the securities which might be issued by the private utility companies, was an important element in the total cost to the Government of any facilities that might be constructed. Strauss stated that the AEC was trying to move forward rapidly with the program that Hughes had outlined to Wenzell. Strauss also emphasized that it was important that the private utility companies give serious consideration to the matter to be discussed and that it be handled without delay. Wenzell told Strauss that he was a vice president of First Boston, and Strauss stated that he was familiar with that firm. It was then arranged that Wenzell would discuss the matter the following day with Williams. Wenzell returned to New York City that evening.

48. On January 19, 1954, Dixon received a telephone call at his New York office from Wenzell who stated that he would be present at the meeting on January 20 as a representative of the Bureau of the Budget and that Dixon should not be surprised to see him there.

49. Pursuant to the arrangements previously made, Wenzell returned to Washington from New York on January 19 to see Williams at AEC. On his own volition and without consulting any representative of the defendant or of First Boston, Wenzell took with him Paul Miller, an assistant in First Boston's buying department. Miller had participated actively in the financing of the OVEC project in which First Boston had acted as financial agent for OVEC. Wenzell thought that it was inevitable that various questions relating to financing an enterprise such as the OVEC project would arise at the January 20 meeting and that it would be desirable to have an expert available to answer such questions.

At the AEC building, Miller registered as representing First Boston, as did Wenzell. Wenzell and Miller met with Williams and Cook of the AEC, and were advised by Williams of the discussions that had previously been held with Dixon and McAfee. Cook was present, because he had been designated as the official who was to be responsible for looking after the project for AEC after Williams' resignation, which occurred on January 31, 1954. There was no discussion about financing, and there is no evidence of any statements made by either Wenzell or Miller. Cook and Williams were told that Wenzell was a consultant to the Bureau of the Budget, but Cook did not know until later that Wenzell was also an officer of First Boston. Wenzell and Miller remained overnight in Washington.

50. On the morning of January 20, Wenzell and Miller first met with Hughes and then went to the AEC to attend the scheduled meeting, which was delayed until afternoon because of McAfee's late arrival. At AEC Wenzell and Miller had a general discussion about the proposed project with Williams. At 3 p. m. the meeting convened. In addition to Wenzell and Miller, it was attended by McAfee and Dixon, and by Williams, Cook, MacKenzie, and Sapirie of AEC. Strauss was present for a few minutes. Wenzell was the

only representative of the Budget Bureau at the meeting. Miller was not a representative of any Government agency but, as earlier stated, had come to Washington at Wenzell's request.

51. The proposal that had been discussed before the meeting was the construction of additional facilities in the Paducah area to supply power to AEC as a substitute for power then being furnished by TVA to AEC at Paducah, so that AEC could release a like amount of power to TVA for use by its other consumers. McAfee and Dixon stated that they were ready and willing to do anything possible, without regard to profit, to help with the problem of furnishing power. Thereupon, there was much discussion about the wisdom of constructing a new plant near Paducah where so much power generation was already concentrated. It was pointed out that if the AEC cancelled its existing contracts at Paducah or reduced its power consumption there, there would be great difficulty in marketing the tremendous oversupply of power in that area.

It was made plain that the purpose of the power plant to be constructed was not to satisfy any increased need of the AEC but to relieve TVA's need in the Memphis area, and this led to a discussion of the possibility of building the plant near Memphis to produce power for delivery to TVA. Since the AEC had no projects in the Memphis area and required no power there, a question arose as to whether AEC should act as the contracting agency with the private utility companies, as had originally been proposed by the Government. It was stated that AEC would contract and pay for the power but that it would be physically delivered to TVA, and that the effect of this would be to release an equivalent amount of power which TVA was supplying to AEC at Paducah. Dixon stated that he thought it would be a much better plan to have TVA contract directly for the proposed new plant instead of having AEC act as contracting party. No questions were raised regarding the details of financing the proposed plant, and there is no evidence that Miller made any statements or suggestions at the meeting.

After the meeting at the AEC had adjourned, there was a conference shortly thereafter in Hughes' office in the Budget Bureau in accordance with arrangements that Williams had

made. The conference was essentially a continuation of the meeting at the AEC. In attendance were MacKenzie, Cook, Williams, McAfee, Dixon, Wenzell, Miller, McCandless, and Hughes. McAfee and Dixon reiterated their desire to be of assistance but again expressed their concern about the location of another plant at the Paducah area, pointing out that such a plant would require additional transmission lines for both TVA and the private utilities at considerable additional costs and that the area was geographically unsuitable for future distribution and use of the power in the event AEC's needs were reduced.

Dixon stated that Middle South's utility system had previously made proposals to furnish TVA 450,000 kw. in the Memphis area and was ready to do so at any time at whatever cost the Federal Power Commission deemed fair. It was finally decided that Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could generate 450,000 to 600,000 kw. of power across the river from Memphis in the territory of Middle South.

Hughes indicated that probably the AEC could contract for the construction of a plant in the Memphis area, but both Dixon and McAfee thought this was an awkward way of handling the matter. After the utility company executives had argued this point somewhat, Hughes informed them that the decision as to which agency would be the contracting party would be made by the Government.

The evidence shows that from December 2, 1953 (the date on which Dodge first discussed the proposed project with Strauss), until the Power Contract was signed, the defendant never changed its decision that the AEC was to be the contracting agency for the generating plant. However, the meeting in Hughes' office on January 20, 1954, was the first occasion when the Government requested the utility company executives to consider the construction of the proposed power plant in the Memphis area rather than at Paducah.

52. There is no evidence of any statements by Wenzell at either of the January 20 meetings. Miller said nothing at the first meeting, but at the meeting in Hughes' office, he pointed out that a heavy concentration of power in the Paducah area and the possibility of a decrease in AEC's

need there might affect the prospects of obtaining money for the construction of the proposed plant.

53. On the morning of January 20, 1954, Wenzell told Dixon that during the previous summer he had made a confidential study for the Budget Bureau in Washington and had been recalled by the Bureau. He also told Dixon that he was attending the January 20 meeting as a representative of the Budget Bureau rather than as a First Boston man. At that time, Dixon did not understand what Wenzell's assignment in the Bureau of the Budget was nor was he told the precise nature of Wenzell's work.

At the close of the meeting in Hughes' office, Dixon stated that he would begin some investigations of the kind mentioned at the meeting. Since Dixon expected to be absent from New York for a few days, it was agreed that Wenzell would meet with Tony Seal of Ebasco, which performed engineering services for Dixon's companies. Wenzell was to inform Seal about what was contemplated in order to expedite the matter.

On the evening of January 20, 1954, Wenzell and Miller returned to New York. Their transportation and other expenses of the trip from New York to Washington and return were defrayed by First Boston.

54. Wenzell did not return to Washington until February 4, 1954, but on January 21, 1954, he met with Seal pursuant to the arrangements made on January 20. Wenzell related to Seal the substance of the discussions that had been held in Washington and advised him to get busy on an exhaustive study of the proposed project. There was no discussion of finances at the time.

The meeting with Seal and subsequent meetings which Wenzell had in New York until about March 15, 1954, with representatives of the utility companies were held either at the request or with the knowledge of Hughes, to whom Wenzell frequently telephoned from New York.

55. On January 27, 1954, Seal and Paul Canaday, who was a vice president and director of Middle South, came to Wenzell's office at First Boston. Canaday and Seal were attempting to formulate a plan for the project. Wenzell stated that he was at their service as a representative of the Bureau of the Budget on the all-important matter of the

cost of interest on money that would be borrowed to finance the construction of the plant. It was well known that the cost of money played an important part in the cost of the entire project and in the price at which the energy could be produced and sold.

During the period of Wenzell's services with the Budget Bureau, which began in January 1954 and ended April 3, 1954, Wenzell was advising Hughes as well as Dixon and his associates on the cost of money. Hughes had requested Wenzell to stay in touch with Dixon and his associates on the development of a proposal and particularly to help point up the real cost of money to be used in financing the project. The object was to obtain the best rate possible and to get a figure which would not only be used by Dixon but would be known to the Bureau so that both would be talking about one and the same factor.

On January 29, 1954, Hughes telephoned to Wenzell in New York City to find out what had occurred in the meetings that Wenzell had had with Canaday and Seal.

56. On February 3, 1954, Wenzell met again with Canaday and Seal who were working on a proposal. The evidence does not show what the parties said or did. At that time, it was too early to discuss the details involved in financing the project.

57. On February 4, 1954, Wenzell returned to Washington to see Hughes in order to bring Hughes up to date on what had occurred during Wenzell's New York meetings with Dixon's associates. Although the evidence on the matter is not clear, it appears that Dixon was in Hughes' office on the same day and engaged Hughes and Wenzell in a conversation about the cost of money for the project. Dixon and Wenzell returned to New York on the same day by plane. Wenzell inquired about the status of the work of Dixon's organization in the preparation of a proposal, and there was some discussion about the cost of money and about Wenzell's responsibility in furnishing information about this phase of the matter. Dixon then asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a project similar to the OVEC project.

58. On February 5, 1954, a meeting arranged by Wenzell was held in his office. Besides Wenzell, Harter and Cannon, vice presidents of First Boston's sales department, and Miller were present. Since Harter and Cannon were in touch with the securities markets, Wenzell asked for their best judgment on the interest rates that would have to be paid for funds borrowed to finance the construction of a plant similar to OVEC, taking into account three hypothetical bases of corporate capitalization, i. e., (1) a high debt ratio of from 90 to 95 percent of debt to total capital, (2) an intermediate ratio of from 75 percent debt to total capital, and (3) a ratio of 50 percent debt and 50 percent equity. It was assumed that the total cost of the plant would be about 90 million dollars. After careful consideration of the problem, Wenzell was told that money could be obtained on the three hypothetical bases at the following respective interest rates: (1) 3½ percent, (2) 3½ percent, and (3) 3¼ percent. Wenzell could have obtained this information from other sources, but he was acquainted with the First Boston executives and considered that First Boston was one of the best and most reliable sources, if not the best source, of such information.

Wenzell did not indicate why he wanted the information from Harter or Cannon, nor what was to be done with the figures supplied by them.

Later, during the same day, Wenzell had a telephone conversation with Dixon and advised him about the results of the meeting.

59. On February 8, 1954, Wenzell went to Washington to report to Hughes the results of the meeting held on February 5 at First Boston on the cost of money. Hughes requested that further studies be made on other forms of capitalization and on different periods for repayment of the debt. Hughes stated that the Government could not contract for power for a longer period than 25 years, but he wanted information on amortization of the debt for a longer period of time so that a portion of the debt would be outstanding after the expiration of the contract with the Government.

During the day, Dixon and Canaday met with Wenzell and also with E. J. Donnelly of the Bureau of the Budget in Wenzell's office in the Bureau. Donnelly was the prin-

cipal budget examiner for the TVA, the Canal Zone, and other agencies. In 1953, when Wenzell was engaged in his study of the TVA, he had obtained most of the data used in preparing his report from Donnelly. Also, Donnelly mailed Wenzell additional information regarding TVA on January 22, 1954. In the room at the time, there were a number of documents relating to TVA, of which some were published and some were not available to the public. At the meeting, those present particularly looked at and used the monthly financial statements which were prepared by TVA for its own purposes. The Budget Bureau was furnished a copy each month, but the documents were not available to the public. There was a general discussion on the various costs incurred by TVA, such as generation, transmission, and other costs set forth in the financial statements. Wenzell asked Donnelly to supply certain additional information relating to the cost of power to TVA, the quantity and cost of power TVA purchased from private industry, and TVA's cost of distribution.

At Hughes' suggestion, Wenzell went to a meeting on the same day in Nichols' office at the AEC, where Dixon, Canaday, and Seal were also present. Dixon reiterated his previous statement that the project was being approached in an awkward manner, but that he would do his best to prepare a proposal in accordance with instructions given by the Bureau of the Budget.

60. On Wednesday, February 10, 1954, Wenzell had another meeting at First Boston with Cannon, Harter, and Miller to obtain some further information on interest costs in relation to the longer period of amortization which Hughes had mentioned to Wenzell on February 8. The discussion was concerned with a capitalization based upon a ratio of 80 percent debt and 20 percent equity. On the assumption that the total amount borrowed would be 120 million dollars, that it would be amortized over a 40-year period, that the AEC contract would run for 25 years, and that 75 percent of the debt would be paid off at the expiration of the contract, the conclusion was reached that the loan could be made on the basis of an interest rate of 3½ percent.

During the same afternoon, Hughes phoned Wenzell, and later Wenzell and Seal had a telephone conversation. It was Wenzell's recollection that he probably gave both Hughes and Seal a report of the results of the meeting at First Boston.

61. On or about February 14, 1954, Wenzell attended a meeting in Dixon's office where Dixon, Canaday, and Seal were present. Canaday and Dixon had been working on figures and had reached the point where they tried out the application of interest rates. Wenzell gave them the information on interest rates that he had previously obtained from First Boston, and they made some tentative calculations on the basis of those rates. Hughes had impressed upon Wenzell the necessity for speed on the project, and Wenzell was interested in seeing that work on the proposal was proceeding.

On February 15, Hughes again telephoned to Wenzell in New York to discuss the project. Hughes was aware that Wenzell had attended the meeting in Dixon's office as a consultant of the Budget Bureau. On the same day, there was a telephone conversation between Wenzell in New York and Dixon in Pittsburgh, but there is no evidence as to what was discussed.

62. About the middle of February 1954, Dixon asked Paul Hallingby, then assistant to Dixon as president of Middle South, to give his opinion as to whether a proposed power plant could be financed through the issuance of securities based upon a debt ratio of 95 percent debt to 5 percent equity as in the OVEC project and, if so, what the cost of the debt money would be. Hallingby made inquiries of several investment bankers and officers of institutional investors (other than First Boston), who were well apprised of the state of the bond market, and then informed Dixon that debt financing could be obtained at an interest rate of about 3½ percent on an assumed debt structure like that of OVEC.

63. When McAfee learned at the meeting of January 20, 1954, that the defendant was considering the erection of the proposed power plant in the Memphis area, he lost interest in the matter because the location was far removed from the pool area of the companies in which he was interested.

On January 22, 1954, he left for the Orient and was out of the country for nearly two months.

About February 16, 1954, Dixon met Ralph Moody, an officer of Union Electric Company, in Pittsburgh to discuss the question of whether Union Electric would join with Middle South in making a proposal to the AEC for the proposed plant in the Memphis area. Dixon then learned that Union Electric had no interest in the matter because the location was outside its pool area. However, Moody wrote McAfee, who replied that he had not changed his mind and that his company would not participate in the construction of a plant in the Memphis area. Moody advised Nichols of McAfee's decision on February 19, 1954.

Sometime prior to February 18, Dixon informed Wenzell that Union Electric was no longer interested in the project, and Wenzell promptly relayed this information to Hughes.

64. About February 18, 1954, Wenzell learned from Dixon that he was to attend a meeting the following day in the offices of Southern in New York City in an effort to persuade that company to join in the venture.

In a telephone conversation prior to the meeting, Hughes requested Wenzell to attend as representative of the Budget Bureau. When Hughes learned that McAfee's company had decided not to participate in the venture, Hughes was disturbed because he felt that if only one company had to carry the entire responsibility, there was a chance that no proposal would be made to AEC.

65. At the meeting held on February 19, 1954, in the offices of Southern, Dixon, Canaday, and Seal were present as representatives of Middle South. Southern officers who attended included Yates, James M. Barry, chairman of the executive committee, the company's senior engineer, its senior accountant and its senior counsel.

First Boston had done a considerable amount of financing for the subsidiaries of Southern, and Wenzell had known Yates for many years. However, the meeting of February 19 was the first occasion at which Wenzell had ever met with or talked to Yates concerning the project. Wenzell was told by Yates that he had been to see Hughes a few days prior to the meeting and that the Georgia Power Company,

one of Southern's operating subsidiaries, had previously written TVA offering to sell a substantial block of power. At the close of the meeting, Yates gave Wenzell copies of the correspondence relating to the offer made to TVA.

During the meeting, Dixon made an earnest plea for Southern to join Middle South in the proposed venture and stated that Middle South had done sufficient preparatory work to determine that a proposal could be submitted to the Government. There was little or no discussion about financing the project. Except for Wenzell's conversation with Yates regarding the latter's earlier meeting with Hughes, there is no evidence of what Wenzell said or did at the meeting. On the same day, Wenzell advised Hughes by telephone of what had occurred at the meeting. Hughes stated that he was pleased to hear that Dixon was trying to get another partner. About February 20, 1954, Southern decided to join in the venture, and Yates notified Hughes and Nichols of this decision the same day.

66. On February 19, 1954, Wenzell left on a trip for Denver and did not again engage in any activities relating to the project until February 23, 1954, when he met Hughes and Dixon at the Budget Bureau.

Beginning on February 1, 1954, Canaday and Seal had been making a number of calculations which were used in the preparation of the proposal submitted by Middle South and Southern to AEC on February 25, 1954. The actual drafting of the proposal did not begin until February 20 after Southern had agreed to join the venture. Wenzell did not participate in the drafting of the proposal.

At the February 23 meeting Dixon showed Hughes a copy of an early draft of the proposal. About noon on the same day, Dixon and Yates met in the AEC with Nichols. McCandless and Wenzell were also present as representatives of the Bureau of the Budget. The purpose of the meeting was to review the tentative draft of the proposal with Nichols to ascertain whether it contained sufficient information for AEC's consideration.

67. While he was in Washington on February 23, 1954, Wenzell drafted an opinion letter which he showed to both Dixon and Hughes. The letter read as follows:

DRAFT—2/24/54

LETTERHEAD OF THE FIRST BOSTON CORPORATION

Mr. E. H. DIXON,
President, Middle South Utilities, Inc.
2 Rector Street, New York 6, N.Y.

DEAR MR. DIXON: You have furnished us with a copy of the proposal of Middle South Utilities, Inc. and The Southern Company addressed to the Atomic Energy Commission dated ———— for the sale to the AEC of 600,000 kw of electric power through the creation of a new generating company which would undertake the construction of the necessary facilities. You have advised us that you estimate the capital requirements of the new company for facilities and working capital at around $120,000,000, which you propose to finance on the basis of approximately 95% debt and 5% common stock equity. The equity, to be paid in, is to be $6,000,000 and is to be owned by Middle South Utilities, Inc. and The Southern Company, either directly or by their operating subsidiaries and, possibly, by other utility companies. You have also advised that you want to arrange for up to $130,000,000 of debt capital in order that you may have some cushion for contingencies.

You have asked us to advise you as to the cost of such debt securities on the basis of the 25 year power contract with the AEC outlined in said proposal supplemented by a (30 year) power contract between the proposed generating company and the utility companies owning the common stock equity under which these companies will agree to take or pay for sufficient power to service the debt securities to the extent that sales to the AEC or to others may not be sufficient to do so, first mortgage bonds not exceeding $130,000,000, having a maturity of 30 years (beyond the completion date of the new plant, estimated to be approximately 36 months) and amortized through a level debt service type of sinking fund (which will retire 75% of the bonds by the end of 25 years after the facilities are completed and 100% by maturity).

It is our opinion that under the foregoing circumstances, and under existing market conditions, such debt securities can be sold by the corporation to institutions at an interest cost not to exceed 3½% per annum.

It is understood that bond proceeds will be taken down over the period of construction of the facilities estimated to be approximately three years and that a standby

charge of ——% per annum for the unused portion of the $130,000,000 total will accrue starting ————.

Very truly yours,

THE FIRST BOSTON CORPORATION,

By ——— ———

Although Wenzell prepared the draft in Washington on the 23rd, his recollection was that it was typed and dated when he returned to his New York office on the following day.

The draft of the proposal which Dixon and Yates had available for the meetings of February 23 contained, in the following paragraph, the only reference to the cost of money:

> We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation.

The above-quoted statement was inserted in the proposal in reliance on the oral information previously given by Wenzell to Dixon as the opinion of First Boston that the project could be financed on the basis described in finding 60. Dixon had suggested to Wenzell that it would be desirable to have First Boston's oral opinion set forth in a letter, and this suggestion led Wenzell to prepare the draft. On February 23, when the sponsors' tentative proposal was shown to Hughes, he was told that the above-quoted statement was based on First Boston's oral opinion on interest costs, and that a draft of a letter from First Boston, confirming the oral opinion, was being prepared.

As previously stated, the cost of money was an important factor in the total cost of the project, and Hughes had requested Wenzell to make sure that the interest rate to be used by the sponsors in their proposal would be the best figure obtainable, under a capitalization based on a high ratio of debt to equity and with the debt payable over a long period of time. The draft prepared by Wenzell on February 23 was not formally executed by First Boston, but if it had been signed and sent by First Boston, it would have

substantiated the oral opinion previously obtained by Wenzell from First Boston and conveyed to Hughes and Dixon.

68. Sometime in the week prior to February 27, 1954, Dixon and his counsel, Daniel James, had a discussion about Wenzell's activities. James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project. Therefore, James told Dixon that since Wenzell was an officer of First Boston and was also employed by the Budget Bureau, a difficult situation might be created if Dixon should subsequently ask First Boston to handle the financing of the project. James said it was apparent that the project was developing into a public versus private power fight and that it would be unwise to give the opposition anything which could be used as the basis for an attack. James did not consider that a conflict of interest was involved but thought the sponsors could not afford a situation where the opposition might make it appear that there was a taint of illegality. James advised that Dixon mention the matter to Wenzell with the suggestion that Wenzell might want to speak to his own counsel and to the Budget Bureau about it.

In accordance with the advice received from his attorney, Dixon spoke to Wenzell about the matter in Washington on February 23, 1954. The record does not clearly show what he said to Wenzell, but in substance he asked whether Wenzell had considered the possibility that criticism and embarrassment might result from the fact that Wenzell, as an officer of First Boston, had been doing special work on a project for the Bureau of the Budget, if it later developed that First Boston should be employed to handle the financing of the same project. He suggested that Wenzell discuss the situation with the Bureau of the Budget and with his counsel.

69. On the same day (February 23), Wenzell told Hughes that there were certain implications that might flow from Wenzell's interest opinion draft: that the sponsors were submitting to the Government a proposal which was based upon an interest rate that was accurately described in Wenzell's draft; that the interest rate mentioned in Wenzell's draft was "a very tight figure", which Wenzell had given to the

sponsors because it was desirable to get an accurate figure with the expectation that the financing could be obtained at the rate mentioned. He further stated that First Boston was the source of the information in this draft and that if market conditions changed for the worse, the sponsors could use the draft as a moral commitment by First Boston, obligating it to arrange for the financing at the interest rates stated. He then pointed out to Hughes that if it later developed that First Boston should be asked to handle the financing for the sponsors and should give them a letter similar to Wenzell's draft, the facts that he had been the instrumentality for obtaining the interest figure from First Boston, had given the figure to the sponsors, and had used the same figure in his draft could cause criticism against and embarrassment to the Administration, in that it could be charged that he, as a First Boston officer and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston. Although Wenzell spoke to Hughes about embarrassment to the Administration, the record as a whole shows that he was concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well. In the conversation, Wenzell suggested that Hughes discuss the subject with his political advisers. Hughes replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore the question with counsel, and then to talk with Dodge about the matter.

70. Wenzell returned to New York on February 23 and, after he arrived at his office in the evening, he discussed the problem referred to in the preceding finding with Coggeshall, president of First Boston. In a general way, Coggeshall knew that Wenzell had been doing some work with the Budget Bureau, but he had no direct responsibility for Wenzell's activities. However, since Woods was abroad, Wenzell briefly related his conversation with Hughes to Coggeshall, who felt that the situation was of such importance that Wenzell should obtain advice from First Boston's counsel, Sullivan & Cromwell. Coggeshall thereupon called Arthur Dean, the partner in the firm who generally handled First Boston's

business, stating that Wenzell had been working as a consultant to the Bureau of the Budget; that certain problems had arisen, and that Wenzell wanted to talk with Dean or one of the partners in the firm. Since Dean was leaving the city, it was arranged that Wenzell would see Raben, another partner in the firm, on February 26, 1954.

71. On February 25, 1954, Middle South and Southern submitted to the AEC a proposal which was signed respectively by Dixon and Yates, whereby they agreed to form a new corporation which would finance and construct generating facilities from which 600,000 kw. of electric power would be delivered to TVA at the Tennessee line for the account of AEC. The sponsors proposed that the new corporation enter into a contract with AEC for a term of 25 years under which the power would be furnished upon payment of a base capacity charge of $9,626,000 per annum, plus an energy charge which was to be subject to adjustment, plus reimbursement of State, Federal, and local taxes to be paid by the new corporation. The proposal stated that the contract would provide that AEC would make arrangements with TVA for the receipt by it and the delivery to AEC in kind of the power and energy to be supplied by the new company The proposal is in evidence as defendant's exhibit 23 and is made a part hereof.

72. On February 26, 1954, Wenzell conferred with Raben of Sullivan & Cromwell. Wenzell related that his work as a consultant with the Bureau of the Budget had been finished in the fall of 1953, but that he was called back to the Bureau again the following January for a brief period to do what he could to expedite the submission of a proposal by some private utility companies, and that his current role with the Bureau was substantially finished. Wenzell then showed Raben a copy of the sponsors' proposal and the draft of his February 24 interest opinion letter. He explained that, in his capacity as consultant to the Bureau of the Budget, he had obtained information from First Boston as to the interest rates on the financing of the project and had passed the same information on to Dixon and to the Bureau of the Budget. He then asked whether Raben saw any objection to First Boston's signing a formal opinion letter along the lines of Wenzell's February 24 draft. Raben re-

plied that the question was purely academic since, in point of fact, Wenzell had already supplied the information to the Bureau and to Dixon, and the letter would amount to no more than confirmation of the oral information.

Wenzell stated that the sponsors' proposal had not been accepted by the Government and that if a proposal should be accepted, many months might elapse before that occurred. He also informed Raben that First Boston had not been employed to handle the financing by any of the parties interested in the proposal. He then inquired whether any problems would arise if it developed in the future that a proposal was accepted by the Government and First Boston was requested to arrange for the sale of the debt securities. Thereupon, Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. He also advised that if the proposal was later accepted and First Boston was requested to handle the financing, the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee. Finally, he told Wenzell that he should keep Dodge and Hughes informed about any developments in the matter, including any decision which First Boston might later make as to handling the financing of the project.

On the same day Raben telephoned to Dean, who was in Washington, D. C., at the time, to get a confirmation of the advice given to Wenzell. Dean confirmed the advice Raben had given Wenzell in all respects and further stated that he did not see any problem of a conflict of interest, but that there was a question of policy for First Boston to consider. He felt that since Wenzell had served as a consultant to the Budget Bureau, First Boston might well handle the financing as a matter of public service and not accept any fee. He also stated that First Boston should keep Hughes and Dodge informed on whatever decision was made.

As will hereinafter appear, Wenzell did not resign immediately, nor did he ever submit a written resignation to the Bureau of the Budget. He continued to act as a consultant to the Bureau until April 3, 1954.

73. After the AEC received the sponsors' proposal of February 25, AEC asked the Budget Bureau for its views. On

February 26, Hughes introduced Canaday, Seal, and Barry, representing the sponsors, to Carl H. Schwartz, Chief of the Resources and Civil Works Division of the Budget Bureau. Hughes stated that the sponsors' representatives would be available to answer questions, and told Schwartz that he wanted a memorandum containing an analysis of the proposal made and delivered by March 2, 1954.

During the discussion which followed, the Bureau staff submitted several questions, including an inquiry as to how the power, which was to be delivered to the AEC at Memphis, would serve AEC's needs at Paducah. In reply, Seal drew a sketch, indicating that the power would move into the Memphis area where it would be used by TVA and would release power supplied from other parts of the TVA system, so that the power thus released could flow into the Paducah area for use by AEC.

After the meeting with the sponsors' representatives, the Bureau staff continued its analysis of the proposal throughout the weekend, when it was apparent that sufficient information was not available to submit the financial comparision that was desired. Accordingly, on Monday, March 1, Schwartz telephoned Hughes, who was in New York. Hughes said that Wenzell would be in Washington that day and would see Schwartz.

The members of the AEC staff also began a review of the sponsors' proposal of February 25. On February 27, 1954, Cook telephoned Dixon, learned that the base capacity charge in the proposal had been computed on the basis of an interest cost of 3½ percent on funds to be borrowed, and obtained some information regarding the proposed energy charge. During the conversation, it was arranged that Dixon would send Seal to Washington on the following Monday (March 1) to go over the figures with AEC.

74. Wenzell had not participated in the initial reviews of the proposal by either the AEC or the Budget Bureau staffs, but on March 1, he arrived at the Budget Bureau and was present at a meeting of the staff, which was engaged in completing the review of the proposal and in the preparation of the memorandum to be sent to Hughes. Wenzell brought with him Powell Robinson, an assistant vice president of

First Boston's sales department, who attended the meeting. Robinson did not attend as an official or consultant of any Government agency. He made no statement or suggestion during the time he was present.

By the time this meeting was held, Wenzell had completed his assignment in the Bureau as to the cost of money for financing the project. Therefore, his function as a consultant to the Bureau during the period from March 1 until April 3, 1954, when he ceased to serve as a consultant, related principally to the total cost of the project. He took the position that the estimates of costs in the February 25 proposal were too high.

Cook either attended the March 1 meeting at the Bureau or furnished the Bureau staff with the results of his analysis, showing that the project would cost the Government about four million dollars per year more than the AEC was then paying TVA for power furnished by it at Shawnee and that the additional costs were due to increases in construction costs and to taxes. Although Wenzell had participated in the discussion relating to the financial aspects of the proposal, certain questions arose about power engineering, and he stated that he was not qualified to answer such questions. He therefore telephoned Seal and arranged for the latter to meet with the group on the following day. As stated, Cook had previously made arrangements with Dixon for Seal to come to Washington on March 1 to discuss the proposal further with representatives of AEC.

75. On Tuesday, March 2, a meeting in the Budget Bureau was attended by three members of the staff, by Wenzell, and by Seal. McCandless and Schwartz were present from time to time. Seal was shown a copy of the preliminary draft of the analysis prepared by the Bureau staff and was asked a number of questions regarding the basis on which certain estimated costs in the proposal had been computed and about engineering details involved in the transmission and delivery of power from the proposed new plant. In general, the questions propounded by the Bureau staff indicated the staff's opinion that the sponsors' costs were high as compared with costs of power supplied by TVA for AEC at the Shawnee plant. Seal supplied as much information as he

could but stated that the proposal had been hastily put together. Seal left about noon and conferred with Cook and Meyer of AEC, pursuant to arrangements Cook had made.

After a further discussion by the Bureau staff, a new memorandum was prepared and delivered by McCandless to Hughes at his home that evening. The memorandum stated that in its review, the Bureau staff had conferred with representatives of the sponsors, had briefly discussed the proposal with Cook, and had had the benefit of discussing it at considerable length with Wenzell. It was stated, however, that sufficient information had not been obtained for a refined comparative cost analysis and that active participation by TVA would be required for such an analysis. The memorandum concluded with the statement:

> We believe that the rates involved are sufficiently close that negotiations should be entered into by the parties concerned.

After the meeting ended, Wenzell went to Seal's office in Washington, stated that the Bureau memorandum had been finished, and that Clapp of TVA and Nichols of AEC were to meet with Hughes again on March 3 for further intra-Government discussions.

76. On or about the period of the March 1–2 meetings held in the Bureau, Wenzell had conversations with several members of the staff and expressed concern regarding his situation. On one occasion, Donnelly, who had worked with and supplied Wenzell much of the data used for Wenzell's September 1953 report, told Wenzell that he was "working both sides of the street" and was likely to get in serious trouble. He suggested that Wenzell's actions were attributable to his lack of familiarity with the restrictions applicable to Government employees as compared with practices in private business. Donnelly also mentioned the matter to Schwartz, his division chief, but never talked to either Dodge or Hughes about it.

While at luncheon with Pilcher and Grahl of the Bureau staff on March 2, Wenzell remarked that he felt that he was in an awkward position in connection with his work on the sponsor's proposal. There was no further mention of the matter at the time, but Grahl learned that Wenzell was

an employee of First Boston, a concern which might be interested in financing the project. Grahl repeated Wenzell's statement to Schuldt, his section chief, and asked whether there was a possibility of a conflict of interest in the situation. Grahl stated that so far as he knew, no conflict of interest existed.

At about the same time, Wenzell also talked to McCandless who knew that Wenzell was an officer of First Boston. Wenzell mentioned that he was somewhat concerned about his situation and intended to speak to Dodge about it. There was no further discussion, but Wenzell later told McCandless that Wenzell had held a very satisfactory conversation with Dodge on the subject of Wenzell's concern.

77. On March 2, 1954, Yates wrote the directors of Southern a confidential memorandum, summarizing the proposal of February 25 and stating that he had made several trips to Washington to talk with representatives of AEC and the Budget Bureau. In the memorandum, Yates further pointed out that after the meetings in Washington and after discussions with representatives of Middle South, Southern had decided to join in the venture. There was also a statement in the memorandum to the effect that First Boston had advised Middle South and Southern that the sponsors' bonds in the amount of $114,000,000 and bearing interest at 3½ percent could be sold to insurance companies under the current market conditions. This statement was based on the information Dixon had obtained from Wenzell and passed on to Yates before the proposal of February 25 was submitted.

78. Sometime after James and Dixon had discussed the problems that might arise by reason of Wenzell's activities in the Budget Bureau and the possibility that First Boston might participate in the financing of the project, Dixon had told James that someone in First Boston had stated that the question of Wenzell's activities would be presented to Dean of Sullivan & Cromwell. On February 27, 1954, James spoke briefly to Dean and learned that he was functioning on the problem. During the next week, Dixon informed James that First Boston's counsel had advised Wenzell to resign his position with the Budget Bureau at once.

Sometime later in March 1954, when Dixon and James called on Hughes in Washington on another matter relating to the project, James raised the question of Wenzell's duality with Hughes. Although James had understood that Wenzell was going to resign, he had learned that Wenzell was occasionally taking part in meetings of the Budget Bureau and James wanted to know why Wenzell was continuing to act as a consultant to the Bureau. Therefore, James pointed out the problem to Hughes in about the same language James had used in his conversation with Dixon during the week prior to February 27, 1954 (finding 68). Hughes made no comment on the matter.

79. Sometime after February 26, 1954, when Raben, with Dean's concurrence, had advised Wenzell to resign promptly as a consultant to the Budget Bureau, Dean told Coggeshall that this advice had been given to Wenzell. Coggeshall did not inquire whether Wenzell had resigned but simply assumed that Wenzell had accepted the advice and submitted his resignation.

On March 3, 1954, Dean inquired of Raben whether Wenzell had resigned. On the same day, Raben telephoned Wenzell and learned that Wenzell had not resigned but was in the process of doing so. Also, on March 3, 1954, Dean talked by telephone with Wenzell, advising him to resign promptly and in writing. At Dean's suggestion, Raben again telephoned Wenzell on March 10, 1954, and found that Wenzell had not then resigned. However, from the statement Wenzell made, Raben decided that Wenzell's decision to resign was an accomplished fact and that the resignation would be submitted momentarily. Consequently, Raben took no further action on the matter.

80. On March 3, 1954, Hughes held a meeting which was attended by Nichols and Clapp and by various members of the TVA, AEC, and Budget Bureau staffs. After a discussion of the general outline of the sponsors' proposal of February 25, it was agreed that AEC and TVA would make a joint analysis of the proposal. Since the Budget Bureau wished to be kept advised of the progress made on this analysis, Pilcher and Grahl of the Bureau were designated to represent it at the TVA-AEC meetings.

Also on March 3, 1954, Strauss wrote Dodge in response to a letter sent by Hughes on September 24, 1953. Strauss' reply contained AEC's analysis of the sponsors' proposal of February 25 and stated that AEC had conducted negotiations with the sponsors with the understanding that the purpose of the project would be to relieve TVA of its previous commitments to AEC for the amount of power to be supplied by the private companies and to free that amount of power for normal load growth in the TVA power area. Strauss pointed out that AEC had a firm contract with TVA for the supply of power and that if higher costs to AEC resulted from a cancellation of the contract between AEC and TVA, such higher costs would have to be justified on the basis of advantages to AEC or overall advantages to the United States and that higher executive authority or Congress should make that determination. He concluded the letter with statements that the AEC was divided upon the advisability of using its contractual authority in the manner that had been proposed and that higher authority would presumably determine what course of action would be in the best interests of the Government.

81. On March 4, Cook sent a teletype to Dixon and Seal requesting information needed by AEC for a further analysis of the February 25 proposal. Since Dixon was out of town, Seal prepared the answers to a portion of the questions, obtained information for answering the remainder from a telephone conversation with Dixon, and then prepared a memorandum which he delivered to Cook at the AEC on March 5, 1954.

82. About March 5, 1954, Schwartz and McCandless decided that the Budget Bureau needed the services of a power engineer to assist in the analysis of the proposal. In the afternoon of that day, they spoke to Hughes and suggested than an engineer from either the Bonneville Power Administration or the Federal Power Commission be obtained for that purpose. At the same time, they told Hughes that Wenzell was becoming a little uneasy about his relationship with the Budget Bureau in connection with the proposal. Hughes indicated that he was familiar with Wenzell's feelings.

83. From the evening of March 2 until the morning of March 9, 1954, Wenzell was in New York. During this period he had the following telephone conversations in addition to the calls he received from Dean and Raben:

March 3—with Hughes and Schwartz in Washington;

March 3—with Canaday in Florida;

March 4—two telephone conversations with Seal;

March 5—three conversations with Hughes, Yates, and Seal, each of whom was in Washington;

March 8—with Yates;

March 9—in the morning with Dixon.

Except for the fact that these telephone conversations related in some way to the project, there is no evidence as to what was said in any of them.

84. On March 9, 1954, Pilcher and Grahl of the Budget Bureau met with Meyer and Sapirie of AEC and Kampmeier of TVA to review the draft of the AEC-TVA analysis of the sponsors' proposal of February 25. Wenzell was not present.

After the meeting at AEC, Grahl and Pilcher returned to the Budget Bureau, where they attended a meeting at which Belcher, McCandless, Donnelly, and Wenzell were present. Wenzell had arrived in Washington in the early afternoon. Grahl supplied copies of the draft of the AEC-TVA analysis and orally summarized it. The analysis showed that the proposal would cost seven or eight million dollars more per year than the estimated cost of the proposed TVA plant at Fulton. It was the opinion of all present that the estimates of costs in the proposal were too high and that an attempt should be made to persuade the sponsors to submit a proposal more favorable to the Government. Wenzell was asked to talk to Seal to determine whether the sponsors would submit a better proposal. Sometime later, Wenzell told Seal that the cost estimates in the February 25 proposal were too high.

85. While he was at the Bureau on March 9, Wenzell called on Dodge and stated that he was concerned that if the sponsors submitted a satisfactory proposal and if there was a financing problem connected with the proposal, whether First Boston would be barred from participating in the financing because Wenzell had been employed as a con-

sultant to the Bureau. Dodge had had little or no contact with Wenzell during the preceding two months. Dodge thought that Wenzell was referring to the possibility of First Boston's participating in an underwriting syndicate with a number of other companies. At that time, there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be obtained before the question of financing would arise. However, Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible. Wenzell replied that he would terminate his work in the Bureau soon. He also said that if anything later developed that would involve First Boston in the financing and if there should be a question of a fee or compensation in connection therewith, he would see that the matter was referred to the Bureau for its prior approval. He added that this promise would also apply to the release of any publicity regarding the handling of the financing.

During the same conversation Wenzell briefly referred to and discussed the overall costs on which the sponsors' proposal was based. Wenzell stated that he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission. Dodge agreed to talk to the Chairman of the Federal Power Commission to see if Adams was available for such an assignment. Wenzell returned to New York on the evening of March 9.

86. On March 10, 1954, Dixon and Yates, along with several representatives of Middle South and Southern, met in Dixon's office to begin preliminary work on a memorandum of understanding between the two companies in connection with their joint proposal. Dixon and Yates had to leave the meeting to attend a conference that day with Linsley, chairman of First Boston's executive committee, in the latter's office, and the memorandum of understanding was completed in their absence.

Wenzell was present in Linsley's office with Dixon and Yates during the discussion. Dixon was well acquainted with Linsley and had frequently asked for Linsley's opinion on security issues and the condition of the money market. Wenzell arranged the meeting because Dixon wanted to make certain that the information given to him by Wenzell represented the opinion of some First Boston official like Linsley. Although interest rates may have been mentioned in the discussion, it was concerned chiefly with the current condition of the financial market as related to the financing of an OVEC type of project. No specific financing plan was discussed.

Prior to the meeting, Linsley had never talked about any matters relating to the project with Wenzell, nor had Linsley known that Middle South and Southern had submitted a proposal to the AEC. It was not until April 12, 1954, that Linsley learned of Wenzell's interest opinion draft of February 24, 1954.

87. On March 10, 1954, McCandless telephoned Wenzell, and on the following day Wenzell had a telephone conversation with Seal.

In the afternoon of March 11, 1954, Wenzell returned to Washington to attend another meeting of the Budget Bureau staff. Those present talked about the joint AEC–TVA analysis of the sponsors' proposal, the high costs included in the proposal, and the desirability of lowering the costs. Prior to the meeting, Pilcher and Grahl had attended a session at the AEC for the review of another analysis prepared by the staffs of AEC and TVA.

At the Bureau meeting, it was decided that the AEC should ask the sponsors to review the draft of the TVA–AEC analysis of the proposal and that someone from AEC should arrange for Seal to submit more information on the sponsors' cost figures.

As a result of the meeting in the Bureau, Cook telephoned Dixon on March 12, stating that the Government's analysis of the proposal showed that there was quite a disparity in the costs set forth in the proposal as compared with an estimate of what it would cost TVA to provide an equivalent capacity at the Fulton site. Cook stated that the principal elements of the cost difference were the capital costs used in

the demand charge and the sponsors' use of the TVA formula for computing the energy charge. Dixon replied that the sponsors would be happy to discuss the matter further and that he would have Seal and Canaday, who were then in Washington, call at Cook's office and go over the points mentioned with Cook. After receiving a telephone call from Dixon, Seal and Canaday met with Cook, who gave them a copy of the draft of the AEC–TVA analysis of the proposal, with the understanding that it would be returned on March 15 or 16, along with the sponsors' statements as to any inaccuracies found in the Government's analysis. Cook also requested that the sponsors' representatives be prepared to furnish their minimum cost proposal at the same time.

88. Wenzell remained in Washington overnight on March 11 and returned to New York the following day. He remained there until Tuesday, March 16, 1954.

On Monday, March 15, 1954, Wenzell had a long-distance telephone conversation with McCandless in Washington. The record also indicates that on the same day Dixon placed a call in Washington for Wenzell, who was in his New York office at the time, and that Wenzell later attempted to return the call. The evidence does not show whether the call was completed.

89. On March 15, 1954, the final draft of the joint AEC-TVA analysis of the sponsors' proposal was prepared and sent to the Bureau the next day in the form of a memorandum from Meyer of AEC to Grahl of the Budget Bureau. On March 16, 1954, representatives of the sponsors, including Dixon, Yates, Canaday, Barry, Smith, and James, met with Dodge in the conference room of the Bureau. Wenzell, who had returned to Washington that morning, was also present at the meeting. The group met to discuss the results of the joint TVA–AEC analysis, a copy of which had been previously given to Seal and Canaday by Cook.

While the meeting was in progress, Grahl called Dodge into the hall to show him a copy of the final draft of the AEC–TVA analysis received that day from AEC. At Dodge's instruction, Grahl handed one copy of the draft to Wenzell.

In the meeting, the sponsors' representatives urged Dodge to have an independent analysis made of the February 25

proposal, whereupon Wenzell suggested that Adams of the Federal Power Commission be requested to make the analysis.

90. On March 16, 1954, several representatives of the sponsors met in Dixon's hotel room in Washington and prepared a draft of a letter to Nichols of AEC in reply to the joint TVA-AEC analysis of the sponsors' proposal. A copy of the draft found in Yates' files has in his handwriting at the top of the letter the word "tentative" followed by his initials and the words "Wash.—March 16". Also in his handwriting below this statement is a series of initials and names listing Hayden Smith, Barry, Yates, Dixon, James, Canaday, and Wenzell.

The testimony with respect to the persons who were present and who participated in the drafting of the letter is vague.

Dixon recalled that a meeting was held in his hotel room to draft the letter and that the draft was taken to the Bureau of the Budget, where the meeting described in the preceding finding was held with Dodge; Dixon said he doubted whether Wenzell was present when the letter was drafted.

James could not remember how the draft was prepared, where, or by whom, but his time account shows that on the preceding day, March 15, he worked on an answer to the AEC-TVA analysis of the sponsors' proposal. His notation indicates that the preparation of the draft may have been started the preceding day.

Canaday was sure that he had seen the letter but had no other recollection regarding it.

Neither Seal nor Barry could recall that he saw the letter or participated in its preparation.

Wenzell's recollection was that he did not meet with the sponsors' representatives in Dixon's hotel room.

Although it has not been shown by a preponderance of the evidence that Wenzell was present at the meeting in the hotel room, he was handed a copy of the draft on March 16, 1954, and he made several changes in the letter in his own handwriting. His copy of the draft with his handwritten changes thereon is in evidence as defendant's exhibit 265.

The letter was never prepared in final form, signed by the sponsors, or sent to the AEC.

91. Pursuant to arrangements made between the Bureau and the Federal Power Commission, Adams began acting as a technical consultant to the Bureau on March 19, 1954, and on the following day was engaged in the study of the several analyses that had been made.

92. Wenzell was in New York from March 17 to March 23, 1954. On March 22, Hughes telephoned him "to make sure that he (Wenzell) had turned everything over to Adams." There is some evidence that Wenzell had a telephone conversation with Seal on the following day, March 23.

On March 23, Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day. McCandless also telephoned Adams, stating that Wenzell would call on Adams and discuss with him the cost of money for financing the type of plant that was then being considered. During the meeting between Adams and Wenzell, the subject of the discussion generally was the cost of money for the bonds involved in financing the proposed plant. Wenzell also talked with Roberts, an assistant to Adams. Wenzell returned to New York the same evening.

93. After Adams had made an independent analysis of the February 25 proposal on the basis of the material furnished him, Adams, McCandless, and other staff members of the Bureau met with Seal on March 24, 1954, at which time Adams stated that the figures in the proposal were considerably higher than a reasonable estimate of costs to the sponsors. Adams then asked Seal to develop basic estimates for the cost of constructing a plant and other facilities to provide the services contemplated in the proposal, and Seal agreed to confer with the sponsors regarding this request.

94. The desk pad kept by Wenzell's secretary shows that on March 24, he had telephone conversations with McCandless, Seal, and Canaday, but there is no evidence regarding the nature of the conversations. The record also shows that there was another telephone conversation between Seal and Wenzell on March 26.

Since Adams had been called in by the Bureau to advise it on the costs of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954.

On March 30, Wenzell had telephone conversations with Yates and Canaday. Also on March 30, Wenzell talked by telephone with McCandless, who asked Wenzell to be present at a meeting to be held at the Budget Bureau on April 3, 1954.

95. By the time the meeting of March 24 between Adams and Seal was held, it was clear to the sponsors that their proposal of February 25 would not form an acceptable basis for the negotiation of a contract. Following Adams' suggestion to Seal, a group of executives from Middle South and Southern, together with engineers from Ebasco and Southern, worked from March 26 to about April 1, 1954, on the preparation of detailed cost estimates covering the construction of a power plant at West Memphis, Arkansas. These cost estimates were used as a basis for the sponsors' proposal of April 10, 1954. There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared.

96. On April 1, Seal and engineers representing the sponsors met with Roberts and Adams in the latter's office and presented the detailed basic cost estimates that had been prepared by the sponsors. These estimates were discussed and reviewed.

On April 2, Hughes met with Adams, Roberts, and McCandless, and it was agreed that Adams would continue his study and be prepared to give a rough outline of his conclusions at a meeting to be held with Messrs. Dixon and Yates on April 3, 1954.

97. On April 2, 1954, McCandless made a telephone call to Wenzell in New York, and on Saturday April 3, Wenzell returned to Washington. On that date, he attended a meeting held at the Bureau, where Hughes, McCandless, Adams, Dixon, Yates, Seal, and Canaday were also present. The meeting had been called by Hughes for the purpose of discussing the sponsors' new cost estimates. As a result of Adams' analysis, it was agreed that the revised cost estimates were better than those contained in the proposal of February 25 but that, further refinement of the figures was required. Dixon and Yates were told that if they could submit a new firm proposal close to the revised cost esti-

mates, the Budget Bureau would feel that the new proposal would deserve serious consideration. Thereupon, Dixon and Yates agreed to outline a proposal for further discussion. Although the record is not entirely clear on the point, it appears that during the meeting, Wenzell confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money.

98. During the afternoon of April 3, Wenzell saw Nichols and Cook at the AEC. Nichols told Wenzell that the sponsors had by that time come close to submitting acceptable figures. He suggested that Wenzell encourage the sponsors to refine their figures and to submit a proposal based on a fixed price for the construction of new facilities, with details as to the basis upon which both the demand and energy charges were calculated. Nichols also mentioned cancellation provisions and said that the AEC could not consider a proposal that was not firm as to capital costs nor one which did not contain cancellation provisions acceptable to the AEC. Nichols told Wenzell that he would be glad to meet with Adams and the sponsors when they were prepared for further discussions.

The meeting was arranged by a telephone call from Hughes to Nichols. Cook understood Wenzell was present as a representative of the Budget Bureau.

Wenzell returned to New York that evening. It was his last trip to Washington in connection with the project.

99. During the second period of his service as a consultant with the Budget Bureau, i. e., the period from January 18, 1954 to April 3, 1954, Wenzell made 11 trips from New York to Washington and return. He did not follow any regular or consistent practice in the manner in which he submitted bills for his travel and subsistence expenses. Although the Government had agreed to pay his transportation expenses and a per diem for subsistence, most of the bills were submitted to First Boston and paid by it. The following is a summary of the dates on which each trip began and ended and the manner in which his travel and subsistence expenses were billed and paid:

(1) January 18, 1954—all expenses paid by First Boston.

(2) January 19–January 20, 1954—all expenses paid by First Boston.

(3) February 4, 1954—the Government paid Wenzell's transportation both ways, but First Boston defrayed his other expenses.

(4) February 7–February 8, 1954—First Boston paid Wenzell's transportation to Washington and all subsistence expenses of the trip. The Government paid his transportation from Washington to New York.

(5) February 22–February 23, 1954—First Boston paid Wenzell's transportation fare from New York to Washington and all subsistence expenses of the trip. The Government paid his fare for travel from Washington to New York.

(6) March 1–March 2, 1954—the Government paid his transportation both ways, but First Boston defrayed all other expenses of the trip.

(7) March 9, 1954—all expenses were defrayed by First Boston.

(8) March 11–March 12, 1954—First Boston paid all expenses of the trip.

(9) March 15–March 16, 1954—First Boston defrayed all expenses of the trip.

(10) March 23, 1954—First Boston defrayed all expenses of the trip.

(11) April 3, 1954—First Boston paid all expenses of the trip.

100. After the meeting of April 3 with Adams and Roberts, the sponsors' representatives reviewed their basic estimates and had new cost figures available by April 6, 1954.

On April 5 and 6, Adams and Roberts discussed the technical aspects of the revised cost estimates with representatives of the sponsors.

On April 6, Hughes, McCandless, and Roberts met with Dixon and Yates at which time the sponsors gave a general outline of a second proposal which they were preparing to submit. The sponsors began the actual drafting of this proposal in Washington, D. C., on April 6.

Also, on April 6 there was a meeting at AEC attended by Nichols, Cook, Dixon, Yates, Adams, and Roberts. The sponsors had a preliminary summary which indicated that in the second proposal, the annual charges to AEC, including estimated taxes, would exceed the AEC annual cost under the AEC–TVA contract at Paducah by $1,669,000.

The annual charge was based upon a facilities cost of $107,250,000. It was agreed that the sponsors would start the preparation of a definitive proposal to be reviewed at another meeting on April 8, 1954. It was further agreed that, after such review, Nichols would present an analysis of the new proposal to the members of the Atomic Energy Commission and that there would be a further discussion with Hughes, so that the Bureau could then make a policy determination as to the course of action to be followed.

On April 7 and 8, Adams and Roberts conferred with AEC staff members and representatives of the sponsors on certain technical aspects of the sponsors' cost estimates and proposed contract provisions.

On April 8, Adams and Roberts, along with Cook and Meyer, met with a group of the sponsors' representatives, including Seal, Canaday, and Barry. The sponsors presented a draft of their second proposal and after the draft had been reviewed paragraph by paragraph, it appeared that all the questions raised by the Government's representatives could be resolved with two exceptions which related to (1) the provision that AEC could not resell the power, and (2) the termination of the contract 11½ years after operations commenced.

101. About April 8, 1954, Dixon asked Hallingby to again check on the availability and cost of debt money for the proposed project. As he had done in February (finding 62), Hallingby talked to various investment bankers and institutional investors and advised Dixon that the debt financing could be obtained at an interest cost of approximately 3½ percent.

102. On April 10 there was an all-day meeting at the AEC. Nichols, Cook, and Meyer represented the AEC, while Adams and Roberts attended as consultants for the Bureau of the Budget. For the sponsors, Dixon, Yates, James, Canaday and Seal were present. The sponsors withdrew the proposal of February 25 and presented the draft of a second proposal based on their revised cost estimates. During the meeting, all aspects of the second proposal were reviewed. The sponsors agreed to several modifications which were to be set forth in a formal proposal to be submitted by them under the date of April 10, 1954.

During the meeting, Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be $3\frac{1}{2}$ percent, but he further stated that if it developed that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols took the position that if the actual cost of money to the sponsors was less than $3\frac{1}{2}$ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate.

The cost of money, to which both Dixon and Nichols referred, is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market. As will hereinafter appear, the actual cost of the money borrowed was $3\frac{5}{8}$ percent for MVG's bonds and $3\frac{1}{4}$ percent for its notes.

103. After the meeting of April 10, the sponsors made a few changes in the proposal and then submitted it to the AEC on Monday afternoon, April 12, 1954, although it was dated April 10, 1954.

The second proposal, like the first proposal, was an offer, whereby the sponsors, in response to the President's budget message, agreed to contract with the AEC for the construction of an electrical generating plant and other facilities near Memphis, Tennessee. The capacity of the plant in both proposals was the same. However, the second proposal differed from the first in several respects.

In the first proposal, the capital cost figures were based on a study which had originally been made for the Mississippi Power & Light Company in connection with an offer it made to TVA. Since that offer related to a plant having 450,000 kw. capacity, the cost figures in the February 25 proposal were adjusted upward to provide for a plant of 600,000 kw. On the other hand, the capital cost figures in the April 10 proposal were based upon estimates prepared by Ebasco for the actual cost of constructing a plant of the desired capacity at West Memphis, Arkansas.

The proposal of February 25 referred to and compared the sponsors' capital cost with TVA's estimated costs for the construction of the proposed plant at Fulton, Tennessee,

whereas the April 10 proposal did not mention a comparison of costs with the TVA Fulton plant.

In the first proposal, the base capacity charge was stated as $9,626,000, whereas the base capacity charge in the second proposal was $8,775,000.

The proposal of February 25 stated that the energy charge and other terms and conditions of the contract, including adjustments, were to be similar to those contained in AEC's contract with TVA for such service, but in the April 10 proposal, the energy charge was stated in specific figures and the terms for the adjustment thereof were set out in some detail.

104. The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal. Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted. As already stated, he returned to New York on April 3 and his activities in connection with the April 10 proposal thereafter consisted of the following:

(a) Several days before April 12, 1954, when the sponsors delivered the proposal to the AEC, a representative of the sponsors either gave Wenzell a copy of the proposal for his examination or called him by telephone and read to him the following paragraph contained in the April 10 proposal:

> We have received assurances from responsible financial specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon the arranging of such financing.

The above-quoted sentence was the portion of the second proposal in which Wenzell had a real interest. Whether the sponsors gave him a copy of the proposal or whether the sentence referred to was merely read to him, he compared the statement on financing in the second proposal with that in the first proposal, ascertained that the second proposal contained substantially the same provision on the subject, and knew that it was based upon the interest rate of 3½ percent that he had obtained from First Boston.

(b) It was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and appendix C to the Power Contract shows that the cost

of money is the largest component of cost included in the capacity charge. In view of that fact and Dixon's knowledge that the conditions in the money market change from time to time, he felt that it was necessary to get current information at the time the sponsors were working on the final details of the April 10 proposal. Therefore, on April 9, 1954, he telephoned Wenzell, asking him to get the informed judgment of First Boston on the current cost of money. On the next day, April 10, Dixon again talked with Wenzell by telephone and was told by Wenzell that it was the judgment of First Boston that the interest rate would be 3½ percent. This information was relied upon by the sponsors in the drafting of the second proposal.

105. On Saturday, April 10, 1954, there was a long distance telephone conversation between McCandless and Wenzell, but the record does not show what was said by either of them.

Wenzell felt that his relationship with the Budget Bureau terminated on April 10, 1954, the date of the sponsors' second proposal.

106. Wenzell performed no services for the Budget Bureau after April 3, 1954. During the period of his services which began on January 18 and ended on April 3, 1954, he did not consider that he was advising parties whose interests were in conflict. He did not feel that by his meetings and telephone conversations with representatives of the sponsors, by obtaining and giving to them First Boston's opinion on the cost of interest, by preparing and showing them the February 24 draft of an opinion on interest rates (finding 67), and by engaging in the other activities which have been detailed in the foregoing findings, he was giving advice and assistance to parties whose interests were different from those of the Budget Bureau, because he felt that the sponsors' interests and the Government's interests in all of these matters were common.

E. *Retainer of First Boston and the Decision as to its Fee*

107: On the morning of Monday, April 12, 1954, there was a meeting in Linsley's office at First Boston, at which Linsley, Wenzell, Dixon, Hallingby, Yates, Miller, and Smith were present. At the meeting, the sponsors' representa-

tives stated that they were preparing to submit their proposal to the AEC and that they wanted First Boston to give them a letter confirming the oral opinion of the interest rates given by Wenzell to Dixon on April 10. It was agreed that First Boston would give an appropriate written opinion. Dixon also asked First Boston to furnish him a statement of First Boston's views on the procedure for securing a commitment for debt financing of the type and in the amount contemplated by the sponsors.

At the meeting, Linsley learned for the first time from Wenzell about the interest opinion letter which the latter had drafted on February 23.

After the meeting, the sponsors' representatives went to Washington and submitted the proposal to the AEC on the afternoon of April 12, 1954. At the meeting of April 12, Wenzell considered that since his services with the Bureau had ended on April 10, he was acting as a representative of First Boston.

108. On January 14, 1954, when Hughes had requested Wenzell to perform some additional work for the Bureau of the Budget, Woods was told by Wenzell that he had been requested to return to Washington and perform services for the Bureau for a few days. At the time, Woods thought that the work was simply a completion of Wenzell's previous assignment. Therefore, Woods indicated no objection and made no further inquiry. Woods was out of the United States from the end of January 1954 until about March 16, 1954. During Woods' absence from the country, Wenzell discussed the project with Miller from time to time. Aside from Wenzell's conversations with Miller and the discussion Wenzell had with Coggeshall on February 23, 1954 (finding 70), there is no evidence that Wenzell discussed his activities on the project with any officer of First Boston until April 12, 1954, when Woods had lunch with Wenzell. During the luncheon, Wenzell related generally what he had been doing in Woods' absence. Wenzell also told Woods that he was then back with the buying department of First Boston.

By the date the luncheon was held, Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal.

109. On April 13, 1954, Hallingby requested Miller to arrange for First Boston to sign the formal opinion letter regarding interest, as discussed the previous day. Using the Wenzell draft of February 24, James prepared a draft of a letter to be signed by First Boston. His draft was erroneously dated March 14, 1954, instead of April 14, 1954, and he erroneously gave the date of the sponsors' proposal as April 14, rather than April 10, 1954. The latter error was carried into the letter signed by First Boston.

With minor changes, the letter was typed at First Boston, signed by Linsley as chairman of the executive committee, and delivered to James at a meeting held in Linsley's office on April 14, 1954, at which Linsley, Miller, Wenzell, and James were present.

The letter read as follows:

APRIL 14, 1954.

Mr. E. H. DIXON,
President, Middle South Utilities, Inc.,
2 Rector Street, New York 6, N. Y.

DEAR MR. DIXON: You have furnished us with a copy of the proposal dated April 14, 1954, addressed to the Atomic Energy Commission by Middle South Utilities, Inc. and The Southern Company regarding the sale to the AEC of 600,000 kw of electric power through the creation of a new generating company which would undertake the construction of the necessary facilities. You have advised us that you estimate the capital requirements of the new company for facilities and working capital at around $107,250,000, and that you propose to finance the new company on the basis of approximately 95% debt and 5% common stock equity. The equity to be paid in is to be $5,500,000 and is to be owned by Middle South Utilities, Inc. and The Southern Company, either directly or by their operating subsidiaries and, possibly, by other utility companies. You have also advised that you want to arrange for up to $120,000,000 of debt capital in order that you may have some cushion for contingencies.

You have asked us to advise you as to the cost of such debt securities on the basis that the power contract with the AEC outlined in said proposal will be for a term of 25 years and will be supplemented by a contract between the proposed generating company and the sponsoring companies under which the latter will agree to take and pay for sufficient power to service the debt securities to the extent that sales to AEC or to others may

not be sufficient to do so, and on the basis that the first mortgage bonds will mature 30 years after completion of the new plant (estimated at approximately 36 months after commencement of construction) and will be amortized through a level debt service type of sinking fund, which will have retired about 75% of the bonds 25 years after completion of the facilities and 100% by maturity.

It is our opinion that under the foregoing circumstances and under existing market conditions, such debt securities can be sold by the Corporation to institutions at an interest cost of not to exceed 3½% per annum.

It is understood that bond proceeds will be taken down over the period of construction of the facilities, which is estimated to be approximately three years.

Very truly yours,

—— ——,

Chairman Executive Committee.

DRL/g.

On one copy of the letter in evidence the figure "14" in the date "April 14, 1954" is circled, and there is a handwritten notation "10" above, followed by the initials "AHW" and the date "5/12/54". These corrections were made by Wenzell on an office copy on May 12, 1954, to show that the date of the proposal was April 10 rather than April 14, 1954.

110. Dixon left New York on April 13 and did not return until about April 22, 1954. On April 14 Miller began preparation of the material Dixon had requested on April 13. Miller asked Hallingby for information on the prospective load growths of Middle South and Southern. Hallingby obtained the information in piecemeal form, and before all of it was assembled, Miller left for Puerto Rico and did not return until April 22, 1954. In Miller's absence, Hallingby had several telephone conversations with Wenzell between April 15 and April 22, 1954, in which Hallingby gave the remainder of the information sought by Miller to Wenzell. There were additional telephone conversations between Hallingby and Wenzell on April 27, April 29, May 5, and May 7.

On April 23, 1954, Wenzell conferred with Miller regarding the project, but the record does not show the nature of the discussion.

111. About the middle of April 1954, James E. Whittemore, head of the public utilities department of Lehman Brothers, an investment banking firm in New York, learned that Middle South was contemplating supplying power to AEC, and he thought there might be an opportunity for Lehman Brothers to participate in the financial arrangements. Accordingly, he made a solicitation by telephone conversation to Hallingby on or about April 15. Whittemore obtained some information about the probable extent of the financing but he was later called back and told that Middle South was not in a position to discuss financial arrangements at that time. On April 22, 1954, Whittemore and another member of his firm, met Hallingby in an effort to have Lehman Brothers' services considered in connection with the financing of the project.

On April 28, Whittemore and his associate met with Dixon, Yates, and Hallingby in the offices of The Southern Company, at which time the ability and the desire of Lehman Brothers to take part in the financing of the proposed new company were discussed. No decision was made regarding the employment of Lehman Brothers as financial agent at that time. A short time later, Dixon discussed the matter with several of his directors, and they decided that Lehman Brothers had some talents that would be helpful in connection with the financing of the project.

112. When Miller returned to his office on April 22, 1954, he learned that Dixon was trying to get in touch with him or Linsley, who had also been out of his office during the latter part of April.

On Friday, May 7, 1954, there was a meeting at First Boston between Dixon, Yates, Hallingby, Woods, Linsley, Coggeshall, Miller, and Wenzell. Dixon stated that he was disturbed that First Boston had not presented its views to the sponsors regarding a proper financial plan for the project and that First Boston had done little toward setting forth its views in a memorandum. There followed a discussion regarding the preparation by First Boston of a memorandum as to the types of securities to be issued and the nature of the financing. Woods planned to use several of First Boston's officers as a small task force to prepare the memorandum and to approach the banks and insurance companies

in the event First Boston was retained to perform the service.

Dixon introduced the idea at the meeting that if First Boston was to arrange for the financing, he would like to have Lehman Brothers associated with First Boston in the undertaking. First Boston was not pleased with this suggestion. Woods stated that he would have to consider the idea and discuss it with his associates.

113. On May 11, 1954, Dixon met Woods and Coggeshall at a luncheon, where Woods stated that First Boston was not particularly anxious to act as financial agent if Lehman Brothers was to be associated in the work and that First Boston did not need the assistance of any other concern. He suggested that it might be just as well if First Boston withdrew from the undertaking. Woods further stated, however, that if Dixon felt that it would be undesirable for Lehman Brothers to handle the matter alone, First Boston was willing to be associated with Lehman Brothers on the conditions that First Boston would have the dominant position so far as authority was concerned and would also to have the senior position with respect to advertising and the division of fees. He left it for Dixon to decide how the arrangement and the conditions stated were to be effected. In the financial community, the senior position in advertising is a matter of importance. Woods considered at the time that if the handling of the financing was successfully consummated by First Boston, the accomplishment would be valuable from an advertising standpoint and would add to First Boston's store of experience. Woods also felt that the advertising might result in First Boston's obtaining other ness of the same kind.

The next day, Dixon advised First Boston (which had had no direct dealings with Lehman Brothers) that the sponsors desired to have First Boston and Lehman Brothers act as financial agents on the conditions that had been specified by Woods.

114. Shortly after the meeting of May 7, Miller began drafting a plan for the debt financing. Although Miller had the responsibility of preparing the memorandum, he discussed it with Wenzell who participated to some extent in the work assigned to Miller. After Miller had discussed

a preliminary draft with Dixon and Hallingby, First Boston proceeded to complete a memorandum outlining a financing plan that was satisfactory to the sponsors.

On May 18, 1954, the final draft of the plan was discussed at a meeting at the offices of Middle South, where Woods, Miller, and Wenzell of First Boston, representatives of Lehman Brothers, and various representatives of Middle South and Southern were present.

It was decided that the fee for the financial agents would be divided on the basis of 60 percent to First Boston and 40 percent to Lehman Brothers and that First Boston would have the preferred position on any advertising.

About May 20, 1954, First Boston and Lehman Brothers first approached the institutional investors. These negotiations continued until the middle of August 1954, when the finance committee of the Metropolitan Life Insurance Company authorized the purchase of bonds, and the terms of the loan had been agreed upon to the extent of providing a basis for negotiation of the bond purchase agreement and related documents. Miller and Linsley acted for First Boston in these negotiations. Ultimately, the financing was arranged at an interest rate of 3.58 percent instead of at 3½ percent, the rate which had been previously used in the opinions given by First Boston as to the cost of the debt money.

115. On May 19, 1954, Woods issued to certain First Boston personnel a memorandum setting forth the agreement he had concluded with Dixon on or about May 12, 1954, regarding First Boston's association with Lehman Brothers in the financing arrangements. The memorandum read as follows:

Black Book Memorandum

MISSISSIPPI VALLEY GENERATING COMPANY

It is planned to organize this Company for the purpose of building a power plant on the Mississippi River opposite Memphis. Its sponsors will be Middle South Utilities, Inc. and The Southern Company. These Companies will own its entire stock, 80% by Middle South and 20% by Southern Company. The entire output of the plant will be sold under contract to the Atomic Energy Commission.

First Boston and Lehman Brothers have been requested by the managements of the sponsoring Companies to act in a general advisory capacity with respect to all financial aspects, and specifically to act as agents in placing the debt of the new Company with insurance companies and banks.

Any fee which may be paid is to be divided 60% FBC and 40% Lehman, and it is understood that FBC is the leader in the business and will have senior position in all advertising and publicity.

Responsibility for this matter will be in the hands of Mr. Linsley and Mr. Paul Miller.

(S) George D. Woods.

116. The testimony is conflicting as to the date when First Boston was first retained by the sponsors to handle the financing for the project. The greater weight of the evidence shows that Dixon understood and believed that First Boston had been retained as of April 12, 1954, when First Boston was requested to issue the letter quoted in finding 109 and to advise Dixon on the procedure for obtaining a commitment of funds. On the same day Miller began to assemble information obtained from Hallingby. Dixon had tried to get in touch with both Miller and Linsley about April 22, 1954, and when the meeting of May 7 was held, Dixon expressed disappointment because First Boston had not proceeded with the preparation of the memorandum of a financial plan. However, the consummation of an agreement between the sponsors and First Boston was delayed when Dixon stated on May 7 that he would like to have Lehman Brothers associated with First Boston on the task of raising the money.

There never was any written agreement of retainer, but the evidence shows that all questions were resolved by May 12, 1954, when Dixon and Woods agreed that First Boston and Lehman Brothers would act as financial agents for the sponsors.

117. During the period between May 25 and the middle of June 1954, Woods, in several conversations with Linsley, took the position that it would be the better policy for First Boston not to charge a fee for its services as financial agent for the sponsors. Linsley agreed with Woods. About June 15, 1954, Woods telephoned Dean, stating that First Boston had decided as a matter of policy not to charge

any fee. There was some resistance to Wood's decision by the other members of First Boston's executive committee, and the matter was discussed by the committee on July 1 and again on September 22, 1954. At a regular meeting held on October 21, 1954, the executive committee took the following action:

* * * * *

In line with the discussions which took place in the Executive Committee meeting on July 1, 1954, and after due consideration, the Executive Committee confirmed our earlier decision not to accept compensation for our services (except remuneration for out-of-pocket expenses) in connection with the *DIRECT PLACEMENT* of up to $93,000,000 principal amount of bonds and up to $27,000,000 of unsecured notes for *MISSISSIPPI VALLEY GENERATING COMPANY.*

* * * * *

The decision not to charge a fee was based on Woods' conclusions that the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in connection with its power policy, and that First Boston should not charge a fee for assistance in obtaining funds that were designed to obviate the necessity of Federal expenditures for the expansion of TVA.

Until November 17, 1954, neither Lehman Brothers nor any representatives of the sponsors had notice of First Boston's attitude regarding the charging of a fee.

118. On November 17, 1954, there was a meeting at the offices of Middle South where Hallingby, Linsley, and Miller were present, along with Whittemore and Gutman of Lehman Brothers. During a discussion about the financial agents' fees, Linsley indicated that First Boston would not charge a fee. It was the position of Lehman Brothers that only a very modest fee should be charged, but Lehman Brothers did not agree that there should be no fee paid to the agents. The matter was left open for further discussion.

119. On November 19, 1954, Miller and Hallingby had a conversation in which Miller disagreed with Hallingby's

proposal that a small fee would be better than none. Miller also tried to make it clear to Hallingby that First Boston would expect no fee regardless of what arrangements the sponsors made with Lehman Brothers.

120. On February 18, 1955, Senator Lister Hill of Alabama, made a speech, criticizing the activities of Wenzell and First Boston. On the following day, Dean was asked to go to Woods' apartment where he met Woods, Coggeshall, and Wenzell. Coggeshall and Woods drafted a statement which First Boston released to the press and which was carried in the news on the next day, Sunday. With respect to fees, the release stated:

> Neither The First Boston Corporation nor Mr. Wenzell received a fee from the Bureau of the Budget nor are we to be paid for services in connection with the generating company financing. * * *

On March 16, 1956, Hallingby expressed dissatisfaction to Miller that Middle South had not been notified before the story was released. Lehman Brothers were also displeased with the news story and felt that they should not have been apprised of First Boston's decision through a news story.

121. Although Hallingby advised Dixon as to what transpired at the meeting of November 17, 1954, Dixon did not understand that First Boston had made a final decision not to charge a fee. On May 5, 1955, he informed Linsley and Miller that he was preparing for his appearance before the SEC regarding the debt financing of MVG, that he anticipated questions relating to fees would be asked, and that he desired a clear statement of First Boston's position on the matter.

On the same day, Dean met with Miller, Woods, and Linsley, at which time Dean suggested that if there was any doubt about the decision which First Boston had made, the doubt should be removed by a clear and explicit letter to Dixon. Dean drafted a letter which, with slight revisions, was signed and sent to Dixon on May 6, 1955. The letter, signed by Woods, read as follows:

> You have again raised the question with us whether we wish to accept a fee for our services in connection

with the senior financing of Mississippi Valley Generating Company, which has taken the form of the direct placement of a maximum of $92,914,000 principal amount of 3⅝% First Mortgage Bonds, and a maximum of $27,086,000 principal amount of 3¼% Notes under a Bank Credit Agreement.

From its inception we have regarded our services in this matter as falling within the category of the public interest. We therefore confirm that we wish no fee for our services.

If you wish to reimburse us for our out-of-pocket expenses, they have amounted to date to $244.84. There may be certain further out-of-pocket expenses in connection with public advertisement of the financing which would only be incurred with your approval.

122. On May 10, Dixon showed a copy of the letter to Lehman Brothers and requested a statement of their position on the matter. The attitude of Lehman Brothers was that the fee should be very modest but that it was a mistake not to charge any fee. However, on May 11, 1955, Lehman Brothers decided that in view of First Boston's decision, Lehman Brothers would not charge a fee.

123. Dixon was surprised by First Boston's decision not to accept a fee for its services as financial agent. The decision was unusual and without precedent in the history of First Boston.

124. On May 11, Canaday appeared before the Arkansas Public Service Commission to testify in support of MVG's application for State approval of its proposed debt financing. He testified in part that the sponsors were using the services of First Boston and Lehman Brothers in working out the terms of the loan and that the financial agents might be paid a fee subject to SEC approval. It was stated that any fees paid would be quite modest.

At the time he testified, Canaday had not been informed of First Boston's letter to Dixon dated May 6, 1955, disclaiming a fee. It was not until later that Canaday learned that neither First Boston nor Lehman Brothers would charge a fee.

125. On June 1, 1955, Wenzell resigned from his position in First Boston. First Boston's method of compensating its officers and employees includes a salary plus a bonus, the bonus being based upon the amount of business which the

employee brought to the firm. In 1954, Wenzell received a salary and a bonus from First Boston, but the evidence does not show the amount of his bonus or the basis on which it was computed. In 1953 and 1954, Wenzell owned 200 shares of stock in First Boston, but the stock was in his wife's name.

126. As shown by preceding findings, Strauss knew on January 18, 1954, that Wenzell was an officer of First Boston. At the conference with Wenzell at AEC on January 19, 1954, Cook and Williams knew that Wenzell was employed as a consultant to the Budget Bureau, but Cook did not know until later (a date not established by the record) that Wenzell was an officer of First Boston. At that time Williams had been given responsibility for handling the project in AEC, and when he resigned on January 31, 1954, Cook assumed that responsibility and continued to discharge it thereafter. Subsequent to January 19, 1954, Wenzell attended five meetings at AEC where it was known that he appeared as a consultant to the Budget Bureau.

On July 7, 1954, during the negotiation of the contract, the AEC representatives were informed that First Boston and Lehman Brothers were acting as financial agents for the sponsors.

In December 1954, the AEC had a representative present at the SEC equity hearings, where it was stated that First Boston had been retained as financial agent for MVG. However, there is no evidence that any representative of AEC had knowledge up to that time that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project, nor that any AEC representatives knew the extent to which the sponsors were aware of Wenzell's activities in that regard.

127. Despite the advice which had been given by First Boston's counsel to Wenzell on February 26, 1954 (finding 72), and the promise which Wenzell made to Dodge on March 9, 1954 (finding 85), neither Wenzell nor any other representative of First Boston ever gave notice to the Budget Bureau that First Boston had been retained as a financial agent by the sponsors or of the terms and conditions upon which the retainer was made.

There is no evidence that the Bureau of the Budget had notice of the fact that First Boston had been retained as a financial agent of the sponsors until February 18, 1955. From that date until March 10, 1955, the legal adviser to the Bureau had possession of a copy of the transcript of the SEC equity hearings. The transcript showed that First Boston and Lehman Brothers had been employed as financial agents by the sponsors.

128. As stated in a preceding finding, the letter of November 23, 1955, by which the AEC advised plaintiff that AEC refused to recognize the Power Contract as an obligation of the United States, was based upon an opinion which Mitchell, General Counsel of AEC, rendered to the Commission on November 15, 1955. After reviewing the activities of Wenzell, as disclosed in the SEC hearings and in the hearings held by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, the opinion (defendant's exhibit 40) concluded with the following:

> My conclusion is that there is a substantial question as to the validity of the contract which can only be settled in the courts.

F. *The Decision to Negotiate a Contract on the Basis of the April 10 Proposal*

129. Following the submission of the April 10 proposal, Hughes held a conference with Clapp and Nichols, together with staff members from TVA, AEC, and the Budget Bureau, at which time it was agreed that TVA and AEC would make a joint analysis of the proposal and that Adams would participate for the Budget Bureau. An intensive review and analysis of the proposal was made, and in connection therewith, representatives of the sponsors met with the Government's representatives to discuss aspects of the proposal and furnish additional information when requested.

On April 24, 1954, Hughes sent the President a memorandum, reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors and that the Bureau be further authorized

to instruct TVA and AEC to work out related interagency arrangements.

On April 28, 1954, Hughes and the AEC received a telegram from a group headed by Von Tresckow, stating that they proposed to submit a proposal to AEC and that it would be more favorable than any other of which the group had knowledge. The Von Tresckow proposal was received by AEC on May 27, 1954, and was subjected to a review and analysis during the period June 3 to June 5. As a result, no decision was then made by the Government to negotiate a contract with the sponsors on the basis of the April 10 proposal.

130. On June 14, 1954, a comparative summary analysis of the sponsors' proposal, the Von Tresckow proposal, and estimated TVA costs for the Fulton plant was presented by Hughes and Strauss to congressional leaders in conference with the President. At that time, the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors.

On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract on a basis generally within the terms of the proposal, and instructing TVA and AEC to work out the necessary contractual, operational, and administrative arrangements between the two agencies so that operations under the contract would be carried out in the most economical and efficient manner.

131. On June 30, 1954, AEC wrote the sponsors in part as follows:

> As Mr. Cook informally advised Mr. Dixon this date, your proposal dated April 10, 1954, offering to furnish 600,000 kw of firm power in the Memphis area constitutes a satisfactory basis for negotiation of a definitive contract.
>
> We are ready to begin negotiations.

The sponsors did not know of the defendant's decision until June 30, 1954. The sponsors' proposal was a firm offer but,

as indicated by the quotation above, the AEC letter was not an acceptance; it was simply a statement that AEC was ready to begin contract negotiations.

132. On April 15, 1954, three days after the submission of the proposal, the law firm of Cahill, Gordon, Reindel & Ohl, with the assistance of the law firm of Winthrop, Stimson, Putnam & Roberts, commenced the drafting of a proposed contract. Shortly after June 30, AEC was advised that the sponsors had prepared a draft of the proposed contract and were ready to begin the negotiations. In order to have the draft printed and allow the AEC an opportunity to consider it, it was agreed that the negotiations would begin on July 7, 1954.

G. *The Negotiation of the Power Contract*

133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.

The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 10, 1954, the Government insisted on two new contract provisions, and it was doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase

536830—60——11

the facilities at any time after three years from the effective date of the contract.

134. On August 18 Nichols and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. At the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as "major concessions from the company" which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

135. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the

Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times, Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

136. Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation.

III. THE REPLACEMENT DEFENSE [2]

137. By a letter agreement entered into August 23, 1951, and a contract effective as of July 1, 1954, TVA agreed to supply substantially the entire output of 1,205,000 kw. from its generating plant at Shawnee, Kentucky, to the AEC installation at Paducah, Kentucky. The contract was for an initial term expiring on January 1, 1966, and there was a provision for annual renewals thereafter through January 1, 1977. EEI had also built a plant at Joppa, Illinois, in the vicinity of Paducah for the purpose of supplying AEC's Paducah installation with 735,000 kw. of electricity. Paducah is approximately 180 miles north of West Memphis, Arkansas. TVA was also supplying a block of 1,730,000 kw. to AEC at its installation at Oak Ridge, about 360 miles east of West Memphis. In 1953, the AEC also had an installation at Portsmouth, Ohio, which was wholly outside the TVA service area. Power for the Portsmouth installation was supplied by a plant constructed by OVEC. As previously stated, AEC had no installations at or near Memphis, Tennessee, and it had no plans in 1953 for further ex-

[2] Paragraph 24 (B) of defendant's answer.

pansion of its existing facilities or for the construction of new facilities.

138. By written contract entered into on November 22, 1935, between TVA and the city of Memphis, TVA agreed to supply all of the electrical needs of the city for a period of 20 years, beginning June 1, 1938, and ending June 1, 1958. Under the contract, Memphis could not buy electricity from sources other than TVA. In 1953 TVA was supplying Memphis with about 350,000 kw., the peak load, but it was estimated that these requirements would reach 520,000 kw. by 1960. As long as there was a possibility of securing power in adequate quantities from TVA, Memphis desired to continue the relationship. It was for the purpose of serving the commercial, industrial, and domestic needs of Memphis and its environs that TVA had sought an appropriation to construct a plant of 450,000 kw. at Fulton, Tennessee, some 20 to 30 miles northwest of Memphis on the east bank of the Mississippi River. As already stated, TVA's request for funds for the Fulton plant had been eliminated from the budget for the fiscal year 1953 by the Truman Administration; efforts to obtain appropriations for the same purpose had been defeated in Congress in 1953 and 1954, and the Eisenhower Administration eliminated TVA's request for funds for the Fulton plant from the budget for the fiscal year 1955.

139. Findings 22, 23, 36, 37, 38, 39, 40, 41, 42, 43, 51, 71, 73, 80, 84, 87, 95, 96, 103, 129, 130, 131, 132, 133, 134, and 135 are pertinent to defendant's replacement defense and are incorporated in Part III hereof. In summary, these findings relate to the Eisenhower Administration's policy on power during 1953 and 1954; the elimination of TVA's request for funds to construct the Fulton plant from the budget for the fiscal year 1955 and TVA's position thereon; defendant's decision to have AEC contract with private utility companies for the construction of new electric generating capacity for AEC at Paducah, so that AEC could in turn release a like amount of power to TVA; the defendant's meetings with Dixon and McAfee; the President's budget message of January 21, 1954; the determination that the need for the proposed new power plant was to relieve TVA

in the Memphis area rather than to satisfy any increased needs of AEC; Hughes' suggestion to Dixon that he make a study of the costs required for the construction of a plant near Memphis under contract with the AEC; the sponsors' proposal of February 25, 1954, and the analysis thereof by the Budget Bureau, AEC and TVA; the withdrawal of the proposal of February 25 and the submission of the sponsors' proposal of April 10, 1954; defendant's review and analysis of the second proposal and of the Von Tresckow proposal; the President's decision that AEC should begin negotiations for the purpose of entering into a contract within the terms of the second proposal; Hughes' direction to AEC to proceed with the negotiation of the contract; Hughes' instructions to TVA and AEC to work out the necessary arrangements for operations under the contract, and the negotiation of the contract.

140. As stated in finding 39, Mississippi Power & Light Company, one of the subsidiaries of Middle South, made a written proposal to TVA on October 15, 1953, by which it offered to erect a plant near Memphis to supply TVA with a block of 450,000 kw. of power for a term of 20 years in lieu of TVA's construction of the Fulton plant. This offer was never acted upon by TVA.

On February 3, 1954, Nichols suggested to Yates that Southern make a similar offer to TVA. Accordingly, on February 9, 1954, Yates wrote Clapp an offer in which Southern agreed to build a plant at Guntersville, Alabama, for the purpose of supplying TVA with 200,000 kw. of power at that location. Yates' letter stated that the President's budget message contemplated that some 500,000 to 600,000 kw. of the load in the TVA service area was to be supplied from other sources by the fall of 1957. Copies of the letter were sent to Hughes and Nichols. Clapp replied on March 1, 1954, stating that Yates had misinterpreted the President's budget message relating to TVA in that the message contemplated that AEC would relieve TVA of 500,000 to 600,000 kw. of power that TVA was obligated to supply AEC, in order that the power thus released could be used to meet the normal load growth in the TVA service area. Yates sent copies of the reply to both Hughes and Nichols.

On February 19, 1954, the Resources and Civil Works Division of the Budget Bureau sent Hughes a memorandum setting forth that division's analysis of both offers. The memorandum stated in pertinent part as follows:

> Following is a brief analysis of proposals made to the Tennessee Valley Authority by the Southern Co. for the Georgia Power Co. and by the Mississippi Power and Light Company. Both utilities propose to sell large blocks of firm power to the TVA at transmission voltage at points on the southern border of the Federal system. Although neither offer involves direct sale to the Atomic Energy Commission or other wholesale customers of TVA, both offers could be considered as a means of achieving the objectives of the President's budget message statements to the effect that arrangements are being made to reduce, by the Fall of 1957, existing commitments of TVA to AEC by 500,000 to 600,000 kilowatts. Power brought in at the southern edges of the TVA system could be used to meet loads there with equal amounts of power from the Shawnee plant in turn being allotted to AEC service at Paducah, Kentucky, under appropriate agreements between TVA, AEC and the utilities involved.

On the following day, January 20, 1954, in a meeting at which Hughes, Dixon, McAfee, and others were present, it was decided that Dixon would prepare a study showing the cost of constructing a power plant across the river from Memphis for the purpose of generating 450,000 to 600,000 kw. of power. At that time, Hughes indicated that AEC would be the Government's contracting agency for the project.

141. As stated in finding 80, when Strauss wrote Dodge on March 3, 1954, regarding the sponsors' proposal of February 25, Strauss stated that the AEC was divided upon the advisability of using its contractual authority in the manner that had been proposed.

On April 16, 1954, after the sponsors' proposal of April 10 had been submitted, Commissioners Smyth and Zuckert of AEC sent Hughes a joint letter reading as follows:

> DEAR MR. HUGHES: On April 15, 1954, the Chairman of the Atomic Energy Commission, Mr. Strauss, sent you a letter, outlining an analysis of the negotiations for certain power to be furnished by Middle South Utilities, Inc., and The Southern Company.

Under this proposal, the Atomic Energy Commission's contracting power would be used as a vehicle for the supply of 600,000 kw. of power in the Memphis area.

With the knowledge of the other Members of the Commission, we are taking this opportunity to bring to your attention our personal view that the proposed action involves the AEC in a matter remote from its responsibilities. In an awkward and unbusinesslike way, an additional federal agency would be concerned in the power business.

The proposal under discussion is an outgrowth of the response to the President's budget message, and your letter of December 24, 1953, requesting the AEC to explore the possibility of reducing existing commitments of the TVA to the Commission. In the course of that exploration, it was determined to be unwise to disturb the AEC arrangements with TVA, upon which our production schedules depend. Since that determination, the explorations have taken a different course.

The present proposal would create a situation whereby the AEC would be contracting for power, not one kilowatt of which would be used in connection with Commission production activities. The creation of such a contractual relationship would place upon the Commission a continuing responsibility during the 25 year life of the contract for stewardship in respect to matters irrelevant to the mission of the Commission.

It has been our observation in government administration that arrangements which are obviously incongruous at the outset tend to become even less clear-cut because no one can foresee what contingencies may arise over a long term of years. In addition, the proposed action certainly seems a reversal of the sound philosophy embodied in the community disposal legislation recently sent forward to Congress. One motivation for that legislation was the desire to eliminate responsibilities not essentially involved in the Commission's sober and exacting principal mission.

Of course, if the President or the Congress directs the Commission to accept such a responsibility, we will endeavor to discharge it fully.

Sincerely,

(S) Eugene M. Zuckert,
EUGENE M. ZUCKERT,
Member, Atomic Energy Commission.

(S) Henry D. Smyth,
HENRY D. SMYTH,
Member, Atomic Energy Commission.

The statement in the letter to the effect that none of the power to be contracted for by AEC would be used in connection with any AEC production activity was based on the facts that AEC had already entered into firm contracts for power to be supplied to it at Paducah, Kentucky, and at other installations; that AEC had decided not to alter the existing contracts, and that the power to be produced by the project was to be generated near Memphis and used in that area where AEC had no requirements for power. Commissioners Smyth and Zuckert felt that the project was not relevant to any needs of the AEC.

142. On April 15, 1954, Strauss wrote Dodge, reviewing the discussions and negotiations with the sponsors and submitting AEC's analysis of the proposal of April 10, 1954. Strauss stated that AEC had proceeded on the basis that there would be no cancellation of the AEC–TVA Paducah contract for the amount of power to be supplied by the project; that AEC would contract with the sponsors for the power needed by TVA for load growth in the Memphis area on the basis of replacement, and that this approach would assure AEC of continuity and reliability of power at its Paducah installation. In addition, the letter stated as follows:

* * * * *

> Consideration of the revised proposal by Dixon-Yates should not overlook the following:
>
> (a) The AEC presently has a firm contract with TVA for supply of power.
>
> (b) Reliability and continuity of power supply to the AEC must be protected.
>
> (c) The entire difference in cost between the Sponsor's revised proposal and the TVA contract is accounted for by taxes.
>
> (d) AEC would expect the Bureau of the Budget to obtain the concurrence of TVA to all provisions of the proposal, and any subsequent definitive contracts relating to TVA.
>
> (e) The proposal provides that the power factor at point of delivery shall be maintained by TVA at no lower than 93%. To maintain this power factor, it may be necessary for TVA to provide reactive KVA in the Memphis area or a penalty may be applied in the form of increased demand charges.

With the understanding that arrangements would be made through the Bureau of the ~~Budget~~ for TVA to enter into a 25-year contract with AEC to take the power provided for under this proposal subject to all provisions including cancellation, the AEC could enter into a contract with the Sponsors to provide TVA with 600 MW needed for its load growth on a basis of replacement. However, it is our position that any costs involved to AEC over and above the cost of power under our present contract at Paducah should be borne by TVA. Otherwise, the TVA would be further subsidized through an operating expense appropriation to the AEC.

We feel that higher executive authority or Congress should make this determination.

* * * * *

143. On April 22, 1954, Cook sent Nichols a memorandum outlining a number of items for discussion with TVA regarding the sponsors' proposal of April 10. In the memorandum Cook stated that before the proposal of April 10 was accepted, AEC should require TVA to agree to accept the power made available under the project for 25 years and that the AEC–TVA Paducah contract should not be changed insofar as TVA's responsibility to serve AEC with power was concerned. However, he suggested that the contract might be modified to provide for the delivery of the Dixon-Yates power, the metering and billing, and the relationship between TVA, AEC, and MVG. He also recommended that under the agreement to be made by TVA and AEC, TVA should pay all of the costs relating to the delivery of power to TVA from the project and that AEC should continue to be liable for all charges to TVA under the Paducah contract.

Attached to Cook's memorandum was a suggested form of agreement to be signed by AEC and TVA. As hereinafter shown, the two agencies never reached an agreement on the matter.

144. On April 20, 1954, Wessenauer, Manager of Power for TVA, wrote to Cook, calling attention to the extraordinary and time-consuming arrangements that would be required for modifying the AEC–TVA Paducah contract and for transferring the Dixon-Yates power to AEC in the event the sponsors' proposal was accepted by the Government.

145. (a) As heretofore stated, on June 16, 1954, Hughes directed AEC to negotiate the contract with the sponsors and instructed TVA and AEC to work out the necessary interagency arrangements (finding 130). Hughes' letter of June 16, 1954, was directed to Harry A. Curtis, Vice-Chairman of TVA's Board of Directors, and stated that TVA would be expected to bear all the costs necessary to receive the power at delivery points and all other costs required for the distribution of the power throughout the TVA transmission system, but that AEC would pay all local, State, and Federal taxes provided for in the contract. His letter further stated that AEC's contract with TVA at Paducah would remain in full force and effect.

(b) On the same day, Hughes wrote Curtis another letter which read in part as follows:

> As set forth in another letter I am sending to you today, arrangements are being made by the Atomic Energy Commission to purchase power under a proposal made by Middle South Utilities, Inc., and the Southern Company. Under this proposal an additional 600,000 KW of firm power will be delivered to the TVA system by the latter part of calendar year 1957 to take care of AEC loads. This arrangement will make available to TVA 600,000 KW of power for use in its system in exchange for power it will be delivering to AEC at Paducah.

(c) On July 2, 1954, Curtis replied to Hughes' letters of June 16, pointing out that TVA had had no opportunity to comment in advance on the instructions given to AEC and TVA and that in TVA's view, the letters were inconsistent with the President's budget message. After quoting from that portion of the presidential message relating to TVA (finding 41), Curtis' letter read in pertinent part as follows:

> As we understand the situation, it was in accordance with this statement in the President's budget message and because the power was to be supplied for AEC's use that the AEC, at the direction of the Bureau of the Budget, solicited the Dixon-Yates proposal, conducted the discussions, and assumed the responsibility for the terms of the proposal. The power was not intended for purchase by TVA, either for the general load growth of the area or to supply new defense loads

such as the Oak Ridge addition projected shortly thereafter. * * *

The instructions of June 16, at least as interpreted by AEC in the testimony before the Joint Committee on Atomic Energy, would not result in furnishing power for AEC as contemplated by the President's budget message. As AEC interpreted the instructions, and that interpretation should be corrected if it is in error, the 600,000 kw of power that would be delivered at the middle of the Mississippi River near Memphis from a plant which would be constructed by Dixon-Yates in Arkansas would be for TVA's use, and not AEC's. According to AEC, it would pay the bills of the Dixon-Yates combine, but adjustments would be made between TVA and AEC whereby the entire cost of this block of power supply would fall upon TVA, including the extra costs required to absorb the power in the TVA system, except for the "local, state, and Federal taxes payable under the terms of the contract" between AEC and Dixon-Yates, such taxes to be reimbursed to Dixon-Yates from AEC funds. Rather than increasing its commitment from private utilities and reducing its commitments from TVA as contemplated in the President's budget message, AEC is to protect its present power supply sources by maintaining its full contract rights for power to be supplied by TVA. It would be contracting with the Dixon-Yates group, therefore, not on its own behalf but primarily for TVA.

In addition, the letter stated that the Dixon-Yates' proposal would add $3,685,000 a year to the Government's cost, that the location of the proposed plant was far inferior to the Fulton site, and that the most serious aspect of the whole arrangement was the lack of control which the TVA Board would have over the costs that TVA would incur.

The letter concluded with a request that the matter be reconsidered.

(d) Under date of August 18, 1954, Hughes replied to Curtis' letter, stating that TVA's request for reconsideration, on the ground that the instructions previously transmitted by Hughes were inconsistent with the President's budget message, resulted from a misinterpretation of the proposal. The letter stated that the proposal contemplated that AEC would purchase power to replace the power which it would otherwise obtain from TVA and that the proposal

did not contemplate that AEC would buy power to supply TVA's requirements; that the arrangement was essentially an interchange of power in kind between AEC and TVA in that AEC would purchase power from the sponsors and trade it to TVA for an equivalent amount of power delivered to AEC at its installations.

In addition, Hughes' letter stated that AEC would pay the costs of procuring the power from the new plant and transmitting it to contract delivery points, while TVA would be expected to bear the cost necessary to receive the power at the delivery points and all costs necessary to distribute and use the power in its transmission system.

Hughes' letter concluded with the following:

> It is expected that the AEC will reduce its commitments from TVA in the amount of approximately 600,000 kilowatts of capacity as contemplated in the President's Budget Message. This will involve a modification of the present contracts between AEC and TVA to reduce the AEC demand by 600,000 kilowatts, with a corresponding reduction in the amounts of energy required by AEC. In exchange, TVA will agree to receive in the Memphis area the same amounts of capacity and energy for the account of AEC and to deliver equivalent amounts, in total, to AEC at its plants.
>
> As explained in my letter of June 16, 1954, the reduction of 600,000 kilowatts in TVA's present commitments to AEC will make this amount of capacity available to TVA for use in its system. Of this total additional capacity, 500,000 kilowatts will be available to meet the estimated growth in industrial, municipal, and cooperative loads in the TVA area through calendar year 1957. The remaining 100,000 kilowatts will be applicable against the increase of 135,000 to 175,000 kilowatts in AEC load at Oak Ridge, which has developed since the President's Budget Message was transmitted and which, in accordance with my letter of June 16, 1954, TVA should plan to take care of with the new generating capacity currently scheduled for installation through 1957.
>
> Under the arrangements described above, there appears to be full provision for control by the TVA Board over the costs TVA would incur. The contemplated arrangements will keep the lines of responsibility clear between AEC and TVA. Inasmuch as AEC will have the responsibility for contracting for the power pro-

duced by Middle South-Southern, it will bear the costs for producing that power. The Tennessee Valley Authority (in exchange for equivalent power delivered to AEC) will receive and use the power through its transmission system and, therefore, should bear its own costs associated with such transmission and distribution. We understand the TVA responsibility for efficient and economical performance to apply to the use of the power and the operating arrangements from the point TVA receives it as exchange power from the Middle South-Southern producers. I am confident TVA will cooperate with AEC in working out arrangements which will result in maximum efficiency and economy for the Government.

It will be greatly appreciated if you will now promptly meet with AEC as they have requested to work out the necessary detailed arrangements. If we can be of further help in any of these matters please let us know.

(e) On August 26, 1954, Curtis responded to Hughes letter of August 18, stating that Hughes' letters of June 16 and August 18 presented quite different proposals for consideration by TVA. As to TVA's understanding of these differences, the letter stated in part as follows:

Under the June 16 letters, we understood that the President had ordered AEC to enter into a contract with Dixon-Yates to provide 600,000 kw of capacity surplus to the requirements of its Paducah installations and useful solely, for resale to TVA. We understood that except for the item of taxes, the cost of such power would be charged to TVA. Because we believed that such an arrangement transferred the responsibilities of this Board to the members of the Atomic Energy Commission and destroyed the basis of our accountability under the TVA Act by proposing a major and improvident contract on our behalf, we protested. Our understanding that the capacity proposed to be provided by Dixon-Yates was for the use of TVA, not AEC, was not an irresponsible conclusion; it was fortified by the sentence in your letter of June 16 which stated that "AEC will maintain in force its full contract with TVA at Paducah.". We assumed this to mean that AEC would continue to use the low-cost energy available from TVA's Shawnee plant while purchasing higher cost power from Dixon-Yates for resale to TVA at the higher cost. The Hearing before the Joint Committee on Atomic Energy on June 16–17 offered no evidence that

our interpretation was in error. In fact, it appeared that the Atomic Energy Commission spokesmen agreed with us. Mr. Nichols, for example, testified as follows:

> We (AEC) would be billed for that power by Dixon-Yates, and we would take that bill and, still having our contract for Paducah, we would get a credit on our Paducah contract for the amount of the bill from Dixon-Yates, less the taxes. (Hearing, p. 970.)

In contrast, the second sentence on page 2 of your August 18 letter states "This (the Dixon-Yates arrangement) will involve a modification of the present contract between AEC and TVA to reduce the AEC demands by 600,000 kw with a corresponding reduction in the amount of energy required by AEC." You also say that "inasmuch as AEC will have the responsibility for contracting for the power produced by Middle South-Southern, it will bear the cost for producing that power." If these latter statements represent the final basis for the discussions which you propose between TVA and AEC, then it would appear that the extra costs of several million dollars a year to be incurred by the Government in accepting the Dixon-Yates proposal are the primary responsibility of other Government agencies rather than of this Board. The only costs to be borne by TVA in such an arrangement would be related to the benefits to be received by TVA and the specific amounts would be appropriate matters for negotiation between TVA's staff and the staff of AEC.

In this connection we have a deep concern which we present with great reluctance, but which we feel an obligation to express. TVA has negotiated many contracts with AEC; our representatives have met across the table from the staff of AEC and have negotiated in good faith. So far as we know, there was for a long period an unblemished record of mutual confidence and good will between these two agencies. Under conditions which have prevailed in the past this Board would need no further assurance that your August 18 letter does in fact represent a final conclusion and that it is now contemplated that TVA will be involved in this transaction only as the interchange agent to receive power from Dixon-Yates and deliver power to AEC. We would leave the collateral questions of cost adjustment to negotiation, confident that equity would prevail.

The letter concluded with the statement that TVA was concerned about the possibilities of productive negotiations between AEC and TVA because of several matters, including

the scant attention paid to the judgment of TVA's representatives in the analysis of the sponsors' proposals, Cook's failure to reply to the Wessenauer's letter of April 20, 1954 (finding 144), and the fact that AEC had made available to TVA only selected excerpts from the draft of the contract. A copy of Curtis' letter was sent to Strauss.

146. The sponsors' proposal of February 25, 1954, contained the following statement:

* * * * *

> There is an additional consideration. Since the power to be released by AEC would appear to be for TVA's use in West Tennessee in general and the Memphis area in particular (see the TVA testimony with respect to its proposed Fulton plant), a practical and economical situation can be created if deliveries by the new corporation to you or for your account are made over an interconnection with TVA in that area, and if TVA in turn delivers a like amount of power to the Commission's Paducah facilities from their Shawnee Station. This can be accomplished by locating the facilities of the new corporation near Memphis. This will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in an area which, except for the AEC demand, is already oversupplied with power.

* * * * *

The sponsors' second proposal of April 10, 1954, read in part as follows:

> As stated above, our proposal has been formulated with the end in view of supplying power and energy to your Commission, an agency related in the main to national defense, for use in pursuance of your statutory purposes. At the same time, however, we have attempted by our proposal to assist the Government in the solution of a broader overall problem. TVA testimony before Congressional Committees indicates that the power released by your Commission upon acceptance

of our proposal will be of use to TVA in West Tennessee, and particularly in the Memphis area. It will therefore be both practical and economical if deliveries by our new generating company are made to you or for your account over interconnections with TVA in the Memphis area, and if TVA, in turn, delivers a like amount of power to your Paducah facilities from its Shawnee Station. To do this, the facilities of the new company will be located near Memphis. This plant site will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in the Paducah area which, if the AEC demand were cancelled, would be oversupplied with power.

147. The term "replacement," which appears in the Power Contract, was coined in the AEC and used by Nichols in his testimony before the Joint Committee on Atomic Energy in June of 1954, when amendments to the Atomic Energy Act of 1946 were being considered. At that time, Nichols pointed out that the initial plan which the Government had considered was one in which the private power companies were to build a plant at or near the AEC installation at Paducah, so that TVA's obligation to supply power there could be released and the power used to meet the needs of TVA's other customers; that as a result of discussions with the utility representatives and TVA, it was found that the need for the power was in the Memphis area and, that from an engineering point of view, it was decided that it would be better to locate the source of the new power near where the bulk of it was to be used. During the same hearings, Nichols stated that the AEC–TVA Paducah power contract would not be cancelled, but that AEC would contract with the sponsors to supply power needed by TVA for its load growth in the Memphis area in replacement of the power which TVA was supplying to AEC at Paducah. It was Nichols' conception that the agreement to be entered into between AEC and TVA after the Power Contract was executed would not involve a phys-

cal release of the power which TVA was supplying to AEC at Paducah but that TVA would no longer submit bills to AEC for the demand and energy charges for power delivered to AEC at Paducah and would credit AEC for an equivalent amount of power supplied through the new plant to be erected by MVG. He understood also that the agreement between AEC and TVA would have to include some adjustment for the increased costs incurred by TVA in obtaining power through the new project.

148. The Atomic Energy Act of 1954 was approved August 30, 1954. Section 164 of the Act (68 Stat. 951) provides in pertinent part as follows:

> The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof.

149. As stated in finding 133, contract negotiations began July 7, 1954, and continued to November 11, 1954, when the Power Contract was signed. TVA did not participate directly in the negotiations but was consulted by the AEC representatives from time to time. During the negotiations, changes in the successive proofs of the contract directly involving TVA were considered and agreed upon by the negotiators.

The various proofs of the contract and the minutes of the sessions show that it was never contemplated that TVA would be a party to the Power Contract.

Most of the drafts of the contract contained the following clause:

> WHEREAS, the AEC is making arrangements with TVA whereby TVA will accept deliveries of power and energy hereunder for or on account of AEC; * * *

Each proof of the contract contained a counterpart of so much of section 3.02 of the Power Contract as provides:

> SECTION 3.02. *Delivery Arrangements with TVA and Utilization of Power and Energy:* The AEC will arrange with TVA for the acceptance by TVA of power and energy scheduled by or for the AEC and delivered by the Company hereunder and for the delivery of such amount of power and energy by TVA to the AEC; * * *

150. The last "Whereas" clause of the Power Contract read as follows:

> WHEREAS, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the project;

On November 4, 1954, Nichols submitted to the Joint Committee on Atomic Energy the October 1st proof of the contract and stated that the foregoing "Whereas" clause had been drafted to read as quoted above at the suggestion of the Attorney General's office.

151. In addition to those described above, the contract contained numerous provisions relating to TVA and to the receipt and acceptance by TVA of the power to be generated under the contract.

In its preamble, the contract recited the President's budget message relating to TVA and to plaintiff's intention to furnish power to AEC or to TVA for the account of AEC in replacement of power furnished by TVA to AEC.

Section 1.02 of the contract provided that the primary delivery points should be established by agreement among AEC, plaintiff, and TVA at the Tennessee-Arkansas State line between Shelby County, Tennessee, and Crittenden County, Arkansas.

Section 1.03 provided that secondary delivery points should consist of existing and future direct and indirect connections between the systems of plaintiff and of subsidiaries of the sponsors and TVA.

Section 2.03 stated that plaintiff would cooperate with AEC and TVA in coordination of design and operation of

line terminal positions, circuit breakers, and system relay protection and communication and telemetering and control equipment, etc.; that AEC might designate TVA from time to time as its authorized representative to act for AEC in various technical aspects of the contract, and that it was contemplated that any such designation would be worked out after discussions among AEC, plaintiff and TVA.

Section 3.01 provided for the delivery of reduced amounts of energy in the event one or more generating units were shut down by *force majeure* or for overhaul, required reasonable notice of the starting up or shutting down of any such unit, and provided that reasonable notice for the purpose of this section would be established by agreement among plaintiff, AEC and TVA.

Section 3.03 provided that AEC would make arrangements with TVA so that reactive power should not be taken from plaintiff in excess of that which plaintiff had agreed to supply.

Section 3.07 provided that plaintiff would cooperate with AEC and TVA to maintain the agreed upon voltage at primary delivery points so that it would not vary more than plus or minus 5 percent or such other limits as might be mutually agreed upon.

Section 6.01 provided that plaintiff would use its best efforts to see that arrangements for secondary delivery points between subsidiaries of the sponsors and TVA would provide AEC with substantially the same terms and conditions of test and billing adjustment as were provided for primary delivery points.

Section 7.07 authorized the assignment of the right to power and energy under the contract to TVA with TVA's consent to take it, under certain circumstances, or if TVA did not consent, to cancellation by AEC under the conditions set forth.

Appendix A recited in paragraph "A" that plaintiff proposed to acquire rights-of-way in Arkansas and to construct transmission lines to terminal points at the middle of the Mississippi River in the Memphis area for the purpose of delivering electric energy to TVA for AEC as provided in the contract.

In paragraph "D" it provided that the exact number and location of lines to the middle of the Mississippi River and necessary line terminal positions, circuit breakers, system relay protection communications and telemetering and control equipment, would be determined by mutual agreement among AEC, plaintiff and TVA.

Appendix B as to primary delivery points provided that the facilities of plaintiff would be electrically connected to the TVA system at the middle of the Mississippi River near Memphis, Tennessee, and that the exact number and location of primary delivery points were to be mutually agreed upon by AEC, plaintiff and TVA.

Similar provisions existed with relation to secondary delivery points.

In paragraph III this appendix outlined the general method of accounting for energy deliveries and provided it should be agreed upon in detail among plaintiff, AEC and TVA.

The interpretative memorandum of November 11, 1954 provided that the cooperation of the parties contemplated by section 2.03 of the contract would include preparation of operating memoranda or manuals through collaboration of AEC, plaintiff and TVA as might be mutually agreed to be necessary in order to establish operating procedures for the guidance of operating personnel in the several organizations concerned with the carrying out of the provisions of the contract.

The interpretative memorandum further provided that it was the intention that the terms in section 3.01 of the contract, "except as may be mutually agreed to from time to time", and "except upon reasonable notice" with relation to starting up or shutting down any unit, could later be provided for in contemplated agreements among AEC, TVA and plaintiff and be modified from time to time as actual in-service experience was obtained.

152. (a) The authority and power of the AEC to execute the Power Contract and perform the obligations thereby imposed upon it was the subject of an opinion which the Acting Comptroller General submitted to Strauss by letter of October 5, 1954. The opinion read in pertinent part as follows:

At the time the Atomic Energy Act of 1954 was under consideration by the Congress negotiations for the Dixon-Yates contract had already been undertaken by the Atomic Energy Commission, and a question arose whether the authority of the Commission under section 12 (d) of the Atomic Energy Act of 1946, as amended (section 164 of the 1954 act), was broad enough to cover such an arrangement. In order to resolve any doubt on this point Senator Ferguson offered an amendment to the section, the purpose of which was specifically stated to be to authorize the Dixon-Yates contract. Cong. Record, July 19, 1954, p. 10430. The Ferguson amendment was adopted (Cong. Rec., July 21, 1954, pp. 10770–71), and became a part of section 164. * * *

In my opinion the foregoing language of section 164 and its legislative history authorizes the AEC to execute the Dixon-Yates contract, to obligate the United States to make payments as required by the contract, and to make payment of cancellation charges out of funds now or hereafter made available for expenditure to the AEC.

(b) By authorization of the President, the Attorney General of the United States furnished Strauss an opinion respecting the validity of the proposed power contract. The opinion, which was set forth in a letter dated October 20, 1954, stated in part:

> * * * I have no doubt that the contract, which specifically states as its purpose the providing of electric utility services to the Commission, or to TVA for the account of the Commission, in replacement of electric utility service furnished to the Commission by TVA in connection with the construction or operation of the Commission's installations at Oak Ridge, Paducah, or Portsmouth, is manifestly within the scope of the authority conferred upon the Commission by Section 164. * * *

(c) On December 2, 1954, Strauss requested the Comptroller General for a supplemental opinion in view of certain revisions that had been made in the contract after the Comptroller's opinion of October 5, 1954. On December 13, 1954, the Comptroller General submitted to AEC a supplemental opinion, stating that the revisions in the contract did not affect his conclusions of October 5, 1954, with respect to the authority of AEC to execute the contract and to perform the obligations imposed upon it thereby.

(d) On October 12, 1954, the Acting Comptroller General advised the Chairman of the Joint Committee on Atomic Energy that the execution of the proposed contract was authorized by Section 164 of the Atomic Energy Act of 1954 and that the contract complied with all statutory contract requirements applicable to its execution by AEC. Attached to his opinion was a memorandum containing comments of the various provisions of the proposed contract, including sections 3.04 and 3.05. In the memorandum it was pointed out that these sections of the contract gave AEC the right to sell or dispose of the power to its contractors or to successor project operators for consumption at a project site but that these provisions were meaningless, because no portion of the power was to be consumed at any existing AEC project. It was further stated that while section 3.06 gave AEC the right to transfer the power for use at other Government installations, the right to transfer was limited to power or energy that was no longer required at an AEC project, and that in the event there should be a reduction in TVA's requirements in the Memphis area without a corresponding reduction at an AEC project, AEC could not transfer the surplus power generated by MVG.

It was suggested that the contract be redrafted to conform to the actual situation under which the power was to be delivered.

(e) Prior to the termination of the contract, the United States as *amicus curiae* filed a brief with the Court of Appeals for the District of Columbia on the appeal from the SEC order approving MVG's equity financing. The brief stated in part:

> If there were any doubt, from the face of the statute, that the contract is authorized by the Atomic Energy Act, that doubt would be removed by the legislative history, which demonstrates beyond question that Congress, in enacting Section 164 in its present form, understood that it was authorizing this very contract.
>
> * * * * *
>
> The essential emptiness of their position [that this was not a replacement contract under Section 164] is emphasized by the fact that the arguments which they advance are but a stale rehash of matters thoroughly understood and presented at the time of the Senate debate.

(f) On January 18, 1955, the Division of Corporate Regulation of SEC filed in the SEC equity proceedings a brief which, after quoting from the legislative history of Section 164 of the Atomic Energy Act of 1954, stated in part as follows:

> In view of the foregoing [quotation from the legislative history of Section 164 of the Atomic Energy Act of 1954], it seems absurd to argue that the Power Contract is not authorized by section 164.

(g) On July 11, 1955, the General Counsel of the Atomic Energy Commission furnished the Commission an opinion containing the following:

> 2. *The* MVGC *contract is a valid obligation of the Government.*
>
> The MVGC contract was executed pursuant to authority contained in Section 164 of the Atomic Energy Act of 1954, 68 Stat. 951, 42 U. S. C. 2204.
>
> * * * * *
>
> The MVGC contract is a contract to provide electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA. In its purpose and terms, it is clearly within the express authority of Section 164 of the Atomic Energy Act. The legislative history of the Atomic Energy Act makes it abundantly clear that in enacting Section 164 in its present form, Congress understood that it was authorizing the contract with MVGC.

153. At a meeting on October 5, 1954, the AEC voted to approve the form of the contract with MVG upon the vote of three commissioners present, two of whom, Campbell and Strauss, voted to approve, and one, Murray, abstained. The fourth member, Dr. W. F. Libby, had taken the oath of office as a member of the Commission on the same day, and he withdrew from the meeting because he felt that he was not sufficiently acquainted with the subject to exercise a judgment upon it.

Thereafter, the AEC voted to execute the contract and the record does not disclose that there were any dissenting votes at the time of final approval.

As hereinafter shown, no agreement between AEC and TVA had been made at the time the Power Contract was

executed, nor had any arrangements among AEC, TVA and plaintiff been concluded.

154. Clapp's term as Chairman of the TVA expired on May 17, 1954, and from that date until September 1, 1954, the Board consisted of two members, namely, Harry A. Curtis and Raymond R. Paty, with Curtis acting as Vice Chairman.

On June 30, 1954, Strauss wrote Curtis, advising that AEC was proceeding with the negotiation of the contract; that before the drafting of certain provisions of the contract was completed, discussions with TVA would be necessary, and that AEC would soon be ready to begin discussions with TVA on the necessary contractual, operational, and administrative arrangements between the two agencies. He designated Cook and Sapirie to represent AEC in the negotiations with TVA and asked Curtis to designate TVA representatives so that plans could be made for the first meeting.

In the meantime, the exchange of correspondence between Curtis and Hughes occurred, and nothing further was done regarding a meeting between the two agencies until after August 31, 1954, when Cook sent a copy of the August 11 proof of the contract to TVA with the statement that the contract was essentially in final form and that before it was executed, AEC planned to have discussions with TVA regarding those portions of the contract which pertained to TVA.

On September 1, 1954, General Herbert D. Vogel took office as Chairman of the TVA Board. On September 3, 1954, he met with Nichols, and the following joint statement was issued by them on that date:

> The Chairman of the Tennessee Valley Authority met in conference with the General Manager of the Atomic Energy Commission today to develop a plan for the negotiation of an agreement between the two organizations in connection with the power to be procured under the proposed Dixon-Yates contract.
>
> The Atomic Energy Commission on August 31, 1954, made a copy of the Dixon-Yates contract available to the staff of the Tennessee Valley Authority which is presently engaged in preliminary work designed to obtain the necessary basic data. There are obviously

many technical details to be resolved before final agreement between TVA and AEC can be consummated but a meeting of the minds has been achieved on all fundamental issues and the TVA will proceed in good faith and as expeditiously as possible to prepare the necessary data, and it is expected that the technical staffs of both organizations will get together for discussions within the next ten days.

The Chairman of the TVA and the General Manager of the AEC are agreed that negotiations can proceed between the two agencies in the same spirit of good will that has exemplified past negotiations.

155. During the period between September 9, 1954 and January 19, 1955, the designated representatives of AEC and TVA met on five occasions in an effort to make an agreement covering the acceptance by TVA of the power and energy supplied by MVG in exchange for the power and energy supplied by TVA to AEC at Paducah, in accordance with section 3.02 of the Power Contract. At the first meeting, a dispute arose between the two agencies as to the interpretation of Hughes' letter of August 18, 1954 (finding 145), particularly with respect to the allocation of the costs involved in the receipt and transmission by TVA of the power supplied by MVG. The cost of the power supplied by MVG exceeded the cost of the power supply which AEC was obtaining at Paducah from the TVA plant at Shawnee, and AEC took the position that its share of such excess costs should be limited to the costs that would have been present if the MVG plant had been constructed at Paducah and AEC had released to TVA 600,000 kw. supplied to AEC by TVA at that installation. On the other hand, TVA stated that TVA had the responsibility of supplying power to its customers at the lowest possible cost and that it was not justified in paying any more for the power received from MVG than the cost at which TVA could have obtained the power from its proposed Fulton plant. The TVA representatives stated they were willing to balance any benefits which TVA might receive by having the MVG power put into its system in the Memphis area rather than having it released at Paducah against any additional cost which TVA might incur in the receipt and transmission of the MVG power.

The interagency dispute over the allocation of costs involved, among others, the following matters:

(a) *Investment in Transmission Lines and Transmission Losses.* In order to utilize the MVG power, it would have been necessary for TVA to build transmission facilities at a cost of several million dollars to bring the power from the middle of the Mississippi River to Memphis. The amount of power to be supplied by MVG was 600,000 kw., but the load in the Memphis area varied from 450,000 kw. during some hours to 150,000 kw. during other hours. This would have made it necessary for TVA to carry considerable quantities of power, varying in amounts, to locations about 200 miles distant where the excess power could be absorbed.

(b) *Fuel Costs.* To operate the MVG plant, it would have been necessary to transport coal from the West Kentucky and Southern Illinois fields down the Ohio and Mississippi Rivers to the MVG plant at West Memphis, Arkansas, a greater distance than would have been required for the transportation of coal to TVA's proposed Fulton plant. The question of the assessment of the extra transportation costs had to be solved.

(c) *Additional Power for Oak Ridge.* AEC needed an additional 150,000 kw. of power at its Oak Ridge installation, and the two agencies were unable to decide how much, if any, of the MVG power should be transmitted to Oak Ridge to fulfill that requirement and whether the costs in connection therewith should be allocated, or whether all of the MVG power should be credited to AEC by TVA against the power bills at Paducah.

(d) *Curtailment of the MVG Power Supply.* Power under the Power Contract was subject to curtailment under some conditions, such as when more than one generating unit was out of service. Also, if there was a delay in the completion of plaintiff's plant, there would be a deficiency of the power supply at Memphis. The representatives were unable to agree as to whether any such deficiencies in the power supply would be borne by TVA or AEC.

(e) *TVA's Cost for Accelerating Construction of the Shawnee Plant.* In the discussions over the division of costs, TVA sought reimbursement of certain fixed amounts

which it claimed it had incurred in accelerating the construction of its Shawnee plant for the purpose of supplying power to AEC at Paducah, but AEC decided that it could not justify the payment of these claimed amounts.

During the discussions between the two agencies, five proposals were presented by TVA and four by AEC. The last interagency meeting was held on January 19, 1955, but one proposal by TVA was submitted as late as April 30, 1955. Although the representatives of both agencies negotiated vigorously and in good faith, they were as far apart at the end of April 1955 as when the negotiations began. Their failure to agree was due to the basic differences in their objectives as explained above.

156. In September 1954, a technical committee composed of representatives of AEC, TVA, and MVG was appointed for working out the technical problems required in the delivery of MVG power to TVA and the transmission of the power in the TVA system. The problems involved included primary delivery points, location of river crossings, terminal positions, metered locations, voltage regulation, and the like.

The committee, designated as the Technical Steering Committee, had conferences on September 28, October 21, and November 8, 1954, and June 20, 1955. One of the proposed routes for the transmission lines involved the placing of transmission towers and lines in the city limits of Memphis, and on December 29, 1954, a TVA representative informed the committee that the city of Memphis objected to the placing of towers and lines within the city limits. As a result, it was necessary for the committee to consider alternate routes. In the beginning, the work of the committee was delayed by the fact that TVA had no appropriation available during the latter part of 1954 or early part of 1955 for anything except primary engineering or general planning on the problem of receiving and transmitting MVG power. As of May 31, 1955, the TVA members expressed their reluctance to proceed with technical details until AEC and TVA had made an agreement. At the meeting of June 20, 1955, a TVA representative stated that TVA felt that it was not worthwhile to discuss any further details relating

to the connection of MVG power to the TVA system, because TVA had been advised that the city of Memphis intended to build its own plant and that the city's decision had altered previous concepts to such an extent that TVA would require time to make studies of changes in the system that would be required for acceptance of the 600,000 kw. from MVG without the Memphis load. It was agreed that the committee would meet again on August 1, 1955, but before the date of the scheduled meeting, defendant gave plaintiff notice that the contract would be terminated.

157. In 1952 TVA started negotiations with the city of Memphis for the purpose of renewing the 20-year contract which expired on June 1, 1958 (finding 138). As previously stated, TVA had proposed the construction of its Fulton plant to supply power to the city of Memphis. TVA could not build the Fulton plant without a continuing relationship with the city. That relationship was essential to the acceptance of power by TVA under the Power Contract, because the defendant had decided to have the Power Contract executed in lieu of providing funds for TVA's Fulton plant. The negotiations between TVA and the city of Memphis for renewal of the contract ended when Memphis decided to build its own power plant.

As early as December 2, 1954, Frank Tobey, mayor of Memphis, and Thomas F. Allen, president of the Memphis Light, Gas and Water Division, made public statements through the newspapers that if it developed that the TVA was not permitted to continue to supply Memphis with its power needs, the city would construct its own plant.

On December 20, 1954, in the SEC hearings on MVG's equity financing, Allen testified that he did not believe that Memphis would ever depend upon the MVG plant as a source of power. Dixon, Yates, and their attorneys were present at the time Allen testified. At the hearing, a representative of TVA gave Allen a map prepared by Ebasco showing the proposed connections of the MVG plant with the TVA terminal stations at the north, south, and east limits of the city of Memphis.

On February 17, 1955, Tobey and Allen made a public statement which was published in a front-page article in

the Memphis Press-Scimitar to the effect that Memphis would not accept power from the MVG plant and that if the construction of the plant was commenced in West Memphis, Arkansas, the city of Memphis would take immediate steps to build its own plant. Similar statements were published in a front-page article in the New York Times on February 18, 1955. Dixon, who was in Washington, D. C., at the time, was familiar with the views expressed by the officials of Memphis and responded by statements which appeared in the New York Times and other newspapers on February 18, 1955, to the effect that the MVG contract was with AEC and that his group never had any intention of selling power to the city of Memphis. He further stated that if the city of Memphis wished to build its own plant, it was privileged to do so.

During the negotiation of the Power Contract, no representative of MVG, the sponsors, or AEC discussed the problems of bringing the MVG power into Memphis with its city officials, or inquired of them whether Memphis would accept and use the power supplied by the MVG plant. The officials of Memphis learned what was contemplated by the Power Contract from a representative of TVA.

158. By a joint letter of March 7, 1955, TVA directors Curtis and Paty wrote Hughes, stating that the power to be supplied under the MVG contract would not be ready by 1957 and that there was no certainty that the power would be available in 1958; that the power contract was in litigation; that after a year of negotiation, AEC and TVA had been unable to agree on a method for handling the power to be supplied by MVG; that TVA had participated in such negotiations on the assumption that the power furnished under the Power Contract would be used to meet the TVA load requirements in the Memphis area, but that the city of Memphis had publicly stated that the city would not accept power generated by the Dixon-Yates plant under any circumstances. Curtis and Paty concluded the letter with a request that the Budget Bureau reconsider the construction of TVA's plant at Fulton, Tennessee, and stated that such action would permit cancellation of the Dixon-Yates contract. On the same day, Vogel wrote Hughes,

stating that the Curtis-Paty letter was a personal act of the writers and that Vogel did not approve the letter.

By letter of March 17, 1955, to Vogel, Hughes replied that the Dixon-Yates contract was then in effect; that it would accomplish the purposes set forth in the President's budget message, and that there was no reason for exploring other methods to provide additional generating plants for TVA in the same area where replacement power would be furnished to TVA by AEC. The letter also stated that the negotiation of an agreement between AEC and TVA was a matter of two Government agencies working together in the best interests of the country. However, Hughes' letter requested TVA to ascertain as soon as possible whether the city of Memphis would require further service from the TVA system after the TVA contract with the city expired on June 1, 1958.

On April 5, 1955, Vogel wrote Tobey, inquiring whether the city of Memphis intended to renew its contract with TVA. In his reply of May 18, 1955, Tobey stated that under no circumstances would the city of Memphis become a market for Dixon-Yates power, but he failed to indicate whether Memphis would renew its contract with TVA. Instead, his letter stated that Memphis wished to continue as a part of the TVA system and expressed the hope that TVA would obtain the Budget Bureau's approval of the construction of the TVA Fulton plant. A copy of the letter was sent by Vogel to Hughes on June 3, 1955.

159. On June 23, 1955, in a telegram to TVA, Allen reported that the city commission had authorized the Memphis Light, Gas and Water Division to take the necessary steps for providing a generating plant of adequate capacity for Memphis. On the same date, the telegram was confirmed by letter to the TVA Board. Notice of the city's action was given by Wessenauer of TVA to Sapirie of AEC.

On June 28, 1955, Vogel replied to the letter and telegram in a letter to Allen, stating that TVA would proceed on the assumption that Memphis would be in a position to handle its own load after the expiration of the contract with TVA on June 1, 1958. A copy of this letter with copies of Allen's letter and telegram were forwarded by Vogel to Hughes on the same date.

On June 30, 1955, Tobey and Allen telegraphed to TVA that Memphis would not renew its contract with TVA on the expiration of that contract.

160. On June 30, 1955, Vogel wrote to Hughes, referring to the information received from the city of Memphis and to the city's decision not to renew its power contract with TVA. The letter stated in part:

> Because of the decision of the City it will no longer be necessary for TVA to plan capacity installations to meet the load requirements of the Memphis area. Since the Dixon-Yates plant was proposed as a source of supply for the Memphis load, the City's action eliminates the possibility of using its output in the Memphis area, and the transmission costs involved and other factors would make it impracticable for TVA to utilize MVGC power elsewhere on the TVA system. We believe, therefore, that no arrangements between the Atomic Energy Commission and the Mississippi Valley Generating Company should any longer be predicated on the use of the MVGC plant as a source of supply to TVA * * *.

With his letter, Vogel enclosed a formal resolution which was adopted by the TVA Board on June 30, 1955, and which set forth substantially the same matters as were contained in Vogel's letter.

On the same date (June 30, 1955), the White House made public Vogel's letter to Hughes and the resolution of the TVA Board. The White House release read in part as follows:

> The President many months ago recommended that the City of Memphis develop its own power plant to supply the needs of the people of that area for electric energy. In the absence of any action by the City to accept this responsibility, the Federal Government made the necessary plans to provide adequate power facilities for the Memphis area.
>
> In the light of the notification by the City of Memphis to the Tennessee Valley Authority, the President has requested the Director of the Bureau of the Budget to confer promptly with the Atomic Energy Commission and the Tennessee Valley Authority to determine whether it is in the interest of the people of the area now to continue or to cancel the Dixon-Yates contract.

161. In the light of the action taken by the city of Memphis, Hughes sent letters to both Strauss and Vogel on July 2, 1955. The letter to TVA sought information regarding TVA's proposed plans for new generating capacity and as to any obligations it had for providing back-up power for the city of Memphis in the future. AEC was requested to advise Hughes whether the AEC could make economical use of all or a part of the power that would be made available through the MVG plant and to furnish information on the problems that would be encountered if the contract with MVG should be cancelled. Under date of July 5, 1955, Strauss replied that if AEC was relieved of the proposal to furnish TVA power in replacement for the same amount of power obtained from that agency at Paducah, there would be no economical way for AEC to use the MVG power. He also supplied information as to the problems involved in the event the Power Contract should be cancelled.

162. During a conference with Strauss on July 8, 1955, Dixon left with Strauss a memorandum setting forth Dixon's views on the consequences of the cancellation of the Power Contract. He stated that the only circumstance present and the only reason given for reviewing the Dixon-Yates contract at that time was the action of the city commission of Memphis and the announcement that the city planned to construct its own power plant. In that connection, his memorandum read:

> If the City of Memphis actually builds and operates its own electric facilities and uses its own resources to do so, then there are some changed circumstances. *Absent solid and irrevocable action to that end, there are no new circumstances.*

163. In his reply to Hughes under date of July 5, 1955 (finding 161), Strauss stated that AEC had entered into the Power Contract upon instructions from the President and that if a decision to terminate the contract resulted from a review of data furnished by TVA and AEC, AEC assumed that the President would issue directions to AEC.

On July 16, 1955, Hughes sent the following letter to Strauss:

The President has accepted the commitment made by the Mayor of Memphis at the White House on Monday last that the City of Memphis will construct a power plant adequate to serve the people of his community, and that the City of Memphis will not request any funds from the Federal Government in any way to apply on the cost of construction of that plant. In this situation, there is no longer any requirement for the arrangement made with the Mississippi Valley Generating Company pursuant to my letter of June 16, 1954, to you.

The President has therefore requested me to convey his direction to the Atomic Energy Commission to take immediately the necessary steps to bring to an end the relationship between the Mississippi Valley Generating Company and the United States.

This confirms my oral discussion with you on Monday after the President's decision was made.

Thereafter, on August 1, 1955, Dixon received a letter from AEC, stating that the President had directed AEC to terminate the Power Contract.

164. In the electrical industry, "capacity" is the capability of a plant to generate a certain amount of power, while "energy" is the generation of that power for a specific length of time. Capacity is measured in kilowatts. Energy is measured in kilowatt-hours.

In the power industry, the term "displacement" means the transfer of energy through a power system by a receipt of energy on one edge of the system and the delivery of a comparable amount of energy at another end of the system. The same kilowatt-hours delivered are not necessarily the same kilowatt-hours received. "Wheeling", though not a technical term, is commonly used to describe the process by which a specific block of energy is delivered from a utility on one edge of a system to a neighboring utility on another edge of the same system. Since most electric power systems are interconnected with their neighboring utilities, one system frequently assists another in transferring blocks of power from a place where there is an excess to another place where there is a deficiency.

Since the purpose of constructing the MVG plant at West Memphis was to satisfy TVA's need for additional capacity in that area in replacement of capacity furnished by TVA

to AEC at Paducah, the arrangements contemplated by the Power Contract do not fall in the category of either displacement or wheeling.

The term "replacement" is not a commonly accepted term in the power industry. As previously stated, the term was coined by the AEC in connection with the project involved here. The arrangement contemplated by the Power Contract was an exchange of both capacity and energy at the MVG plant in West Memphis for capacity and energy which the TVA was obligated to supply to the AEC at its Paducah installation.

IV. THE WAIVER DEFENSE [3]

165. Section 164 of the Atomic Energy Act of 1954 (68 Stat. 951) provides in part:

> Any contract hereafter entered into by the Commission pursuant to this section shall be submitted to the Joint Committee and a period of 30 days shall elapse while Congress is in session (in computing such 30 days, there shall be excluded the days on which either House is not in session because of adjournment for more than three days) before the contract of the Commission shall become effective: Provided, however, That the Joint Committee, after having received the proposed contract, may by resolution in writing, waive the conditions of or all or any portion of such 30-day period.

166. The United States House of Representatives, 2d Session of the 83d Congress, adjourned on August 20, 1954, and did not thereafter reconvene.

The United States Senate of the 83d Congress, 2d Session, adjourned on August 20, 1954, and did not reconvene until November 8, 1954, and thereafter met on November 9, 10, 11, 15, 16, 17, 18, 29, 30, and December 1 and 2, 1954, on which last date it adjourned *sine die*.

167. On August 18, 1954, Nichols sent the Chairman of the Joint Committee on Atomic Energy a copy of the sixth proof of the contract dated August 11, 1954, with a letter stating that it would be necessary to begin construction of the power plant at an early date to insure the availability of the power by the fall of 1957. Therefore, Nichols recommended that the Joint Committee consider waiving the

[3] Paragraph 24 (C) of defendant's answer.

30-day requirement specified in Section 164 of the Atomic Energy Act of 1954.

On the same day Hughes wrote the Chairman of the Joint Committee a letter to the same effect, expressing the hope that the committee would waive the 30-day requirement of the act.

168. On October 6, 1954, the Acting Chairman of the AEC wrote the Chairman of the Joint Committee regarding the October 1 proof of the proposed contract. The AEC Chairman reported that before the draft was approved, AEC had favorable letters from the Federal Power Commission, the General Accounting Office, TVA, the Bureau of the Budget, the Chief of Engineers, and an opinion from the General Counsel of AEC. The writer mentioned the discussions between AEC and TVA, declared that the only question remaining open was the distribution of costs between TVA and AEC, and expressed the opinion that, since the question of the distribution of costs did not involve the terms of the contract between AEC and MVG, the AEC did not believe that it should delay consideration of the contract by the Joint Committee. He concluded the letter with the recommendation that the Joint Committee consider a waiver of the 30-day requirement in Section 164 of the Atomic Energy Act of 1954 in order that the power would be available by the fall of 1957 and to permit MVG to take advantage of the remainder of the construction season prior to high water in the Mississippi River.

169. Hearings before the Joint Committee, 83d Congress, 2d Session, were conducted on November 4, 5, 6, 8, 9, 10, 11, 12 and 13, 1954, on the "Exercise of Statutory Requirements Under Section 164, Atomic Energy Act of 1954." The hearings were printed in a volume (plaintiff's exhibit 148) containing 1,020 pages.

170. On November 11, 1954, the AEC sent the Joint Committee an executed copy of the Power Contract and its supplements, the interpretative memorandum, the letter contract between the sponsors and AEC, a copy of the opinion of the General Counsel of AEC, and two letters from MVG regarding the execution and delivery of the Power Contract.

171. On November 13, 1954, the Joint Committee on Atomic Energy of the 83d Congress adopted, by a vote of 10 to 8,

a resolution (defendant's exhibit 125), waiving the conditions of the 30-day period specified in section 164 of the act. The resolution referred to the provisions of Section 164 of the Atomic Energy Act of 1954, the powers and duties of the Joint Committee thereunder, the submission to the Joint Committee by AEC of the contract and other documents described above, the AEC's request that the conditions of the 30-day period of the act be waived, and the fact that the committee had held extended hearings, pursuant to which many changes that would adequately protect the interests of the United States had been made in the contract.

172. On January 28, 1955, the Joint Committee on Atomic Energy of the 84th Congress, 1st Session, by a vote of 10 to 8, adopted a resolution rescinding the resolution of waiver adopted November 13, 1954. The rescinding resolution referred to the provisions of Section 164 of the Atomic Energy Act and to the powers and duties of the Joint Committee, and stated as follows:

* * * * *

> WHEREAS, the Joint Committee by Resolution on November 13, 1954, adopted a resolution purporting to waive "the conditions of and all of the thirty-day period specified in Section 164," while Congress was not in session, and
>
> WHEREAS, the Atomic Energy Commission presented no substantial or compelling reasons to justify the adoption of a waiver resolution while Congress was not in session, and
>
> WHEREAS, the effective date of said contract by its own terms has not yet occurred, and
>
> WHEREAS, the hearings of the Committee on this and related questions were incomplete and inadequate, and
>
> WHEREAS, the action of the then majority of the Joint Committee, in adopting a waiver resolution tended to deprive the 84th Congress of its full opportunity of review and freedom of action with respect to the aforesaid contract.
>
> NOW THEREFORE, BE IT RESOLVED: (1) that the Joint Committee on Atomic Energy do hereby rescind the resolution of waiver, and
>
> (2) that it is the sense of the Joint Committee on Atomic Energy that the said contract is not in the public interest and the Committee recommends that the

Atomic Energy Commission take appropriate steps to cancel the so-called Dixon-Yates contract.

173. (a) On January 18, 1955, during the proceedings on MVG's equity financing before SEC, the Division of Corporate Regulation of SEC filed a brief (plaintiff's exhibit 21-I), stating that the waiver resolution was valid, although adopted while Congress was not in session.

(b) In the same proceedings before SEC, the AEC filed a brief with respect to the waiver resolution, the brief stating in part:

> We need not repeat the demonstration, made in the reply briefs for the Division of Corporate Regulation and the Proponents, that Section 164 authorizes a waiver while Congress is not in session. Indeed the fact that Section 164 uses the phrase "while Congress is in session" only in connection with the requirement that a period of thirty days elapse, and contains no requirement that Congress be in session either when the contract is filed or when a waiver resolution is adopted, is indicative of careful draftsmanship, designed to carry out the intent, which was clearly stated by Senators Ervin, Ferguson, Hickenlooper, Hill, Holland and Gore and disputed by no one during the debates on the Atomic Energy Act of 1954, that the Committee could adopt a waiver resolution when Congress was not in session.
>
> * * * * *
>
> *Section 164 does not empower the Joint Committee to revoke or rescind a waiver resolution once the contract has become effective.*
>
> The Joint Committee's resolution of January 28, 1955 appears to assume that a resolution of waiver is subject, for an indefinite time, to a right of reconsideration by the Committee. No such right of reconsideration is conferred by Section 164. To imply it would defeat the purpose of the provision for waiver by the Joint Committee. The evident purpose of that provision was to avoid the delays that might result if a contract could not become effective until thirty days had elapsed while the Congress was in session.

(c) After the SEC's order approving MVG's equity financing was issued, the order was appealed to the United States Court of Appeals for the District of Columbia on March 14, 1955. The brief (plaintiff's exhibit 28)

which the United States as *amicus curiae* filed with the Court of Appeals contained the following statements regarding the waiver resolution and the rescinding resolution:

> We are not certain whether petitioners intend, by point 5, to renew the argument made before the SEC that Section 164 did not authorize such a waiver while Congress was not in session. It is evident from the terms and legislative history of the section that it did. In terms, it authorizes not only waiver of part or all of the thirty-day period, but also of "the conditions of" such period. One of those conditions, whose waiver is authorized, is the condition that the thirty-day period be a period while Congress is in session. Indeed, if the provision for waiver of the conditions of the thirty-day period is not read as referring to the condition that Congress be in session, it would serve no useful purpose.
>
> * * * * *
>
> The contract having become effective, the Joint Committee's Resolution of January 28, 1955, did not operate to render it ineffective. It is clear that Congress, in Section 164, did not reserve to the Joint Committee authority to rescind a prior waiver resolution so as to invalidate an effective contract. To have done so would have defeated the objective of the waiver provision to permit the procedure to be "expedited" in appropriate cases, for if the waiver were subject to rescission the parties could not safely proceed with their contract until after 30 days had expired while Congress was in session. Reservation in the Joint Committee of a right to invalidate an effective contract would also have raised constitutional problems, which the Senate debates show Congress was careful to avoid.
>
> * * * * *
>
> Even if it could be assumed, however, that the waiver action of November 13 either was ineffective or was validly rescinded, the requirements of Section 164 have nevertheless been fully complied with.
>
> Section 164 requires merely that the contract be filed with the Joint Committee and that a period of 30 days elapse while Congress is in session. The contract had been filed, its terms made public, and the surrounding circumstances fully explored by the exhaustive hearings held last November. By February 4, 1955, there had elapsed 30 days during which Congress had been in session and had had opportunity to take whatever action with respect to the contract it might deem appro-

priate. Nothing in Section 164 imposes a requirement that the filing and the period of thirty days occur at the same Congress or session.

* * * * *

We find no requirement in the text of Section 164 that the contract be such that it would become effective immediately upon the adoption of a waiver resolution; the section provides only that the contract cannot become effective until the requirements of Section 164 are met. Moreover, as we have pointed out previously, the contract did become effective on Dec. 17, 1954, prior to the reconvening of Congress.

The minority's position that the contract had not become effective rests on a misconstruction of the contract which would lead to an untenable result. Section 8.22, which defines the effective date of the contract * * *, does not require the receipt of necessary regulatory approvals as a condition to effectiveness. And while Section 8.15 makes the obligations of the parties subject to the receipt of such approvals, this clearly establishes a condition subsequent and does not prevent the contract from being effective on the date specified in Section 8.22.

(d) On July 11, 1955, the date on which plaintiff was advised by AEC that the President had decided to order termination of the Power Contract, the General Counsel of AEC submitted to the Atomic Energy Commission a memorandum of his views as to the effectiveness and enforceability of the contract. With respect to the resolutions of waiver and rescission, the memorandum stated:

On January 28, 1955, the Joint Committee on Atomic Energy adopted a resolution which purported to rescind the Joint Committee's waiver resolution of November 13, 1954 and which declared it to be the sense of the Joint Committee that the contract is not in the public interest and recommended that AEC take appropriate steps to cancel the contract. Section 164 in my view does not authorize the Joint Committee to rescind or revoke a waiver resolution after the contract has become effective. The express purpose of the waiver proviso was to permit expeditious action in appropriate cases when Congress was not in session. This purpose would be defeated if a waiver could be rescinded after the contract became effective. To permit rescission of a waiver res-

olution would nullify the intent of Congress in enacting the waiver proviso.

Even if we were to assume that the Joint Committee did have authority to revoke its prior resolution, it would be my opinion that the requirements of Section 164 have been satisfied on February 4, 1955, by the expiration of a 30-day period during which Congress had been in session.

Accordingly, I conclude that the MVGC contract was executed and became effective pursuant to legal authority and constitutes a valid obligation of the Government.

(e) In a written opinion submitted by the Assistant Comptroller General to the Chairman of AEC on July 29, 1955, the following appeared:

In our view the conditions of section 164 were satisfied regardless of the effect of the resolution of rescission.

* * * * *

We do not believe section 164 requires that contracts submitted to the Joint Committee thereunder be immediately effective upon the granting of a waiver or the lapse of the thirty-day waiting period. The purpose of the requirement in section 164 for a waiting period or a waiver was to afford the Congress an opportunity to review the power to make such contracts and to take appropriate legislative action if it so desired. The thirty-day period is a minimum period during which the Congress may legislate; any additional postponement of the effective date of a contract would afford even greater opportunity for legislative action. Consequently, it is our view that section 164 fixes a time before, which a proposed contract cannot become effective, rather than a time after which the contract must be effective. In other words, the section does not require the submission to the Committee of a contract which is immediately effective in all respects upon the expiration of the waiting period or the granting of a waiver. The contract has been on file with the Joint Committee from November 11, 1954, to the present time. Thus, even if the waiver action of November 13, 1954, should be considered invalid, the prescribed waiting period of thirty days expired on February 4, 1955, Congress having been in session since January 5, 1955.

V. THE PUBLIC UTILITY HOLDING COMPANY ACT DEFENSE[4]

174. Section 12 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79 (L) (a) provides:

> It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly, to borrow, or to receive any extension of credit or indemnity, from any public utility company in the same holding-company system or from any subsidiary company of such holding company * * *.

This statute has been implemented by a regulation of the Securities and Exchange Commission which provides as follows:

> *Loans, extensions of credit, donations and capital contributions to associate companies*—(a) General provision.—No registered holding company or subsidiary company shall, directly or indirectly, lend or in any manner extend its credit to nor indemnify, nor make any donation or capital contribution to, any company in the same holding-company system, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in Section 250.23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act. (17 C. F. R. Section 250.45 (a), 1949 ed.)

175. During the latter part of May 1954, representatives of First Boston and Lehman Brothers submitted to the Metropolitan Life Insurance Company a proposal dated May 18, 1954, relating to MVG's debt financing. It provided in part as follows:

> The contract between the new company and the AEC will be supplemented by contracts between the new company and companies within the systems of the sponsoring companies under which such system companies will assume several obligations to take or pay for, in the aggregate, sufficient power and energy to service the debt securities to the extent that income from the AEC or others may not be sufficient so to do.

Among the documents attached to the proposal was a suggested text of the major terms and conditions of MVG's

[4] Paragraph 24 (D) of defendant's answer.

first mortgage bonds. Paragraph 7 of the text, which was entitled "Security", provided that the first mortgage bonds would be secured by an indenture of mortgage and a deed of trust, constituting a first lien upon all of the plants and real property of MVG and also upon MVG's interests and rights in the AEC contract and in the agreements of the companies within the two sponsoring systems with respect to the purchase of power and energy to the extent such power and energy was not used by AEC.

On August 11, 1954, Metropolitan's committee on finance and investment authorized the purchase of up to 78 million dollars of MVG first mortgage bonds. The memorandum of authorization stated that, in the event the Power Contract was terminated, the operating subsidiary companies of the two parent companies would be obligated to purchase the power and make payments sufficient to service the debt to Metropolitan.

176. On August 10, 1954, the sponsors entered into a memorandum of understanding relating to the proposal of April 10, 1954, and to MVG, the new company which was to be organized to construct the power plant under contract with AEC. Paragraph D (I) thereof provided:

> (a) The project facilities to be owned by MVG ("the Facilities") are to be designed to have a net capability of approximately 650,000 kw., of which the excess over Contract Capacity (which will be 600,000 kw. subject to certain adjustments) required to be delivered to AEC under the proposal is reserve capacity. Since such excess is not adequate to provide the equivalent of one generating unit of the Facilities, it will be necessary for MSU and Southern, or their respective subsidiaries, to undertake to furnish MVG for delivery to AEC, without additional charge to AEC, power and energy in an amount sufficient, with one generating unit out of service, to deliver Contract Capacity at the so-called Primary and Secondary Delivery Points referred to in the proposal. Such amount is hereafter referred to as "back-up supply."
>
> (b) AEC may in certain circumstances reduce below Contract Capacity its obligation to take and pay for power.
>
> (c) From time to time power and energy may be available out of the facilities in excess of that required for delivery to AEC. Such excesses as may be so avail-

able, whether or not the AEC has reduced its obligation, are hereafter referred to as "surplus supply."

Paragraph D (II) stated that the sponsors or their subsidiaries would enter into agreements with MVG regarding the surplus supply of power generated by MVG. This paragraph further provided:

> (b) The system of each party hereto shall be obligated to pay its participation ratio of all the cost and expenses (other than expenses paid through energy charges) of MVG to the extent, if any, that such cost and expenses may not be paid or reimbursed out of payments received from the AEC and others. Such costs and expenses shall include debt service charges.

The last paragraph provided that the memorandum was intended as a general working agreement for the project and that it was executed with the knowledge that as the project progressed, many matters which were not provided for in the memorandum, as well as matters which were covered therein, would have to be treated in some other manner than as specified in the memorandum.

177. On October 29, 1954, shortly before the execution of the Power Contract, Daniel James, an attorney for plaintiff, wrote AEC in response to a request for information regarding the provisions of the contract with respect to contemplated arrangements with the systems of the sponsors. After referring to sections 2.02 and 8.16 of the proposed contract, as well as the memorandum of understanding of August 10, 1954, James' letter stated:

* * * * *

> The working out of the actual inter-company power agreement is largely a matter of detail. That agreement, in the nature of things, cannot be too rigid and will not necessarily be preserved in exact detail from year to year. It will have to be flexible enough so that amendments may be made to conform with the changing operating and other conditions which may arise over a 25-year period. The limitation is clear, however, that this inter-company power agreement, implementing the overriding obligations of the Company to the AEC and of the Sponsoring Companies to the Company, will not and cannot be modified in any way to impair those overriding obligations. The important consideration from the standpoint of the AEC is that the overriding

obligations themselves are clearly set forth in the power contract itself and are implemented by the memorandum of understanding. These are summarized above.

The various power and financing arrangements must be carried out in their natural and normal order. The working out of the power contract establishes certain overriding obligations of the Company to the AEC with respect to securing contractual arrangements for back-up supply and for the sale of surplus power; the power contract has to be finalized before the financing can be finalized; the finalizing of the financing arrangements will establish certain additional overriding obligations respecting purchasing power and payments for it by the systems of the Sponsoring Companies; and then the contractual arrangements among the Companies can be worked out to implement—but not change—the overriding obligations.

* * * * *

178. The recitals of the Power Contract read in part as follows:

> WHEREAS, the Proposal contemplates, that, of the approximately 650,000 kilowatts of net capability of the new plant, approximately 50,000 kilowatts will be available toward providing the required reserve to supply service hereunder, and inasmuch as such 50,000 kilowatts is not adequate for such purpose when one generating unit is out of service, the Company is making arrangements with the Systems of the Sponsoring Companies so that, in return for the Company's making available to such systems such 50,000 kilowatts of capacity when no units are out of service, such systems will make available to the Company as additional reserve for the Company's obligation to the AEC, at no additional cost to the AEC, up to approximately 200,000 kilowatts of additional back-up capacity when a unit or units of the Facilities are caused to be shut down; and
>
> * * * * *
>
> WHEREAS, among the considerations which induced the Sponsoring companies to make the Proposal and to cause the same to be carried out is the reservation to the Company of the right to make use of the Facilities hereinafter described for purposes other than the supply of capacity and energy to or for the AEC at such times and to such extent as such service to or for the AEC does not prevent such other use;

Section 2.02 of the Power Contract reads as follows:

> Section 2.02. *Interconnections with Sponsoring Companies:* The Company will establish or cause to be established interconnections between the Facilities and the systems of the Sponsoring Companies, directly or indirectly, by means of which there will be afforded additional security of service under this contract from such systems, and an outlet for power and energy produced at the Facilities and from time to time not needed for deliveries to or for the AEC hereunder. The company represents that it is entering into a contract or contracts with the Sponsoring Companies or subsidiaries thereof to provide power to the Company over such interconnections for a period of 25 years after the beginning of initial commercial operation for the purposes of (a) enabling the Company to deliver hereunder the full Preliminary Contract Capacity or the full Contract Capacity, as the case may be, even though one generating unit of the Facilities may be out of service, and (b) making available from the Facilities to subsidiaries of the Sponsoring Companies or others power which from time to time is not needed by the Company to furnish the power to which the AEC is entitled hereunder. Energy taken by systems of the Sponsoring Companies will be charged to such systems at not less than the incremental cost thereof.

In the interpretative memorandum executed by plaintiff and AEC simultaneously with the execution of the contract, the following provision appears:

> Section 2.02. The Company is to furnish AEC with copies of all agreements contemplated by Section 2.02 and paragraph 1 of Section 8.16 and with copies of any amendments or modifications to any such agreements. The Company is also to furnish AEC with copies of all contracts and commitments and amendments or modifications thereto, entered into between the Company and the institutional investors and banks, or representatives thereof, in connection with the financing of the Company's capital investment, including any bond indenture, mortgage or other evidence of indebtedness issued in connection therewith.

The term "incremental cost" which appears at the end of this Section means: "All of the costs and expenses associated with and experienced by the actual production and delivery of the product, electrical energy, over and above all of the costs and expenses which would have been incurred had there been no such ac-

> tual production and delivery." This definition is also applicable to the use of the term "incremental cost" in the last sentence of paragraph 1 of Section 4.08. The parties will from time to time agree upon procedures for determining incremental cost.

In the event the Power Contract was terminated by AEC, section 7.03 of the contract obligated plaintiff to absorb not less than 100,000 kw. of contract capacity on the date of termination and 100,000 kw. of capacity on each succeeding anniversary of the date of termination until the entire contract capacity was absorbed.

179. Contemporaneously with the execution of the Power Contract, Letter Contract No. AT–(49–1)–815, dated November 11, 1954, was entered into between the sponsors and AEC and provided (1) that in the event power was not delivered under the Power Contract by MVG to AEC at the time fixed for initial deliveries; or (2) in the event of termination of the contract for any cause; or (3) the inability of MVG to deliver 400,000 kw.

> * * * the Sponsoring Companies, or subsidiaries thereof, will be obligated to supply, severally and separately and in the proportions of 80 per cent for the Middle South system and 20 per cent for the Southern Company system, and the Commission will be obligated to pay for, 100,000 kilowatts of firm capacity (hereinafter called "Interim Power").

Paragraph 3 of the letter contract provided:

> In either event described in Paragraph 1 above, the Commission and the Sponsoring Companies, or subsidiaries thereof, will enter into a formal contract for the supply of Interim Power (hereinafter referred to as the "Interim Power Contract"). Such contract will include, in addition to the provisions described in Paragraphs 1 and 2 above, the following terms and conditions * * *.

180. Plaintiff's debt financing was to be obtained through bonds purchased by the Metropolitan Life Insurance Company and New York Life Insurance Company and by loans made by The Chase Manhattan Bank and other banks which agreed to take plaintiff's notes. It was a complicated financial transaction and the discussions between the lending institutions and plaintiff's representatives regarding the de-

tails thereof extended from the latter part of May 1954, to sometime in April 1955.

On January 14, 1955, as a result of suggestions made by the insurance companies, plaintiff's attorneys prepared and distributed a new proof of the proposed bond purchase agreement. At the same time, plaintiff's attorneys prepared and distributed to First Boston, Lehman Brothers, the sponsors, and various subsidiaries of the sponsors a memorandum outlining the principal changes that had been made in the bond purchase agreement and the intercompany agreement. The following appears in the memorandum:

Intercompany Agreement

> This Agreement in effect provides for the sale of surplus power of MVG, not taken by the AEC to the Participating Companies and provides for an overriding obligation of the Participating Companies to pay enough to service the debt of MVG to the extent that the AEC's payments do not do so. The capacity charge under the AEC Power Contract is designed to pay all the debt service charges of MVG, but the creditors look to the Intercompany Agreement as security for the payment of their bonds and notes in the event that the AEC contract is cancelled or in the event that the Power Contract should not produce the desired results.
>
> The scope of the obligations to be undertaken by the Participating Companies is one in which the creditors have evinced the greatest interest. The draft Intercompany Agreement which was attached as Exhibit A to the proof of August 25 of the Bond Purchase Agreement as prepared by us provide in effect that the Participating Companies would take and pay for power and energy in specified proportions so that in the event that no power and energy was available for sale to them there would be no obligation to make any payments, whether or not MVG had enough money for debt service purposes. The insurance companies have stated that this type of provision, which was used in the EEI case, was unsatisfactory to them: they want provisions like those obtained in the OVEC situation. The draft Intercompany Agreement which is attached to the new proof of the Bond Purchase Agreement is intended to indicate the type of provisions the insurance companies would like. The principal substantive differences are contained in paragraphs 1 and 2 (c) of the Intercom-

pany Agreement. Under the new proof the Participating Companies would be paying not for power and energy but for the right to receive power and energy and there would be a force majeure clause, substantially the same as that included in the AEC contract. As a result the Participating Companies would be obligated to pay for the right to receive power and energy whether or not they obtained any power and energy and would also be obligated to pay for the right even if due to force majeure, such as an explosion, strike, etc., MVG was in no position to deliver any power and energy to them. It is of course expected that 50,000 kilowatts will be available for sale to the Participating Companies most of the time so that if things work out as expected there would be little difference between our suggestions and those of the insurance companies. The insurance companies point out, however, that their provisions would result in liability for payment by the Participating Companies in the following situations (among others) where no liability would exist under our original draft:

(a) if the AEC Power Contract is cancelled and force majeure occurs which makes it impossible for MVG to deliver power to the Participating Companies;

(b) if the AEC Power Contract remains in effect, but does not produce sufficient revenues to service MVG's debt, and MVG due to force majeure is unable to furnish power and energy to the Participating Companies;

(c) if at a time before the plant is complete, when no revenues are being received from the AEC, MVG has no funds available to service debt.

We have emphasized in discussions with counsel for the insurance companies that, whatever provisions we agree to, the Participating Companies would under no circumstances undertake obligations which amounted to a guarantee of MVG's debt. The obligations reflected in the revised proof come closer to a guarantee than do the obligations originally suggested by us in the August 25 proof. It should be noted, however, that they are not dissimilar from the OVEC obligations which counsel in that case were satisfied were not guarantees. It should also be noted that the amounts to be paid by the Participating Companies will be designed to cover amortization and interest and not the principal of the Bonds and Notes due otherwise than pursuant to regular amortization schedules. The insurance companies have suggested that the amounts

paid by the Participating Companies also cover other mandatory redemptions, but this suggestion appears unacceptable.

In the light of the revisions which have been made in paragraphs 1 and 2 (c) of the Intercompany Agreement, revisions of the Whereas clauses have been made in order to emphasize the business advantages to the Participating Companies of the Intercompany Agreement and thereby minimize the possibility of their obligations being construed as guarantees. Changes have been made in paragraph 6 for the same reason. A specific provision has also been inserted in paragraph 7 to the effect that the obligations of the Participating Companies will terminate in the event of recapture. This was not a necessary provision under our original language, but becomes necessary if the insurance companies' suggestions are to be followed.

With respect to section 6.04 of the proposed bond purchase agreement, the memorandum further stated:

§ 6.04. This Section, as a condition to the obligation of the insurance companies, requires that the important MVG contracts continue in full force and effect. The condition is in substance carried forward to each closing. The insurance companies have requested that one of the agreements which must be in full force and effect is the agreement (the "Supplemental and Surplus Power Agreement") between MVG, Middle South Utilities, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, as to the purchase of supplemental power and the sale of surplus power, as represented in § 2.02 of the Power Contract. In view of the representation contained in the Power Contract, there can probably be no objection to following this suggestion. There would, however, seem to be no necessity for a legal opinion on this agreement unless the AEC asks for it.

The insurance companies also want a condition that the AEC–TVA arrangements as to the delivery of power be in full force and effect. We are trying to find out what the status of these arrangements is. Initially it does not seem appropriate to make the obligations of a private company depend on arrangements between two Government agencies which we contend do not affect MVG's rights under the Power Contract. The insurance companies also want opinions from private counsel as to the validity of the AEC–TVA arrangements. It would again seem inappropriate to have private counsel

pass on the validity of arrangements between two Government agencies.

181. A conference between the banks and plaintiff's representatives with respect to the bank credit agreement was held on February 9, 1955, and the agreements of the parties were set forth in a memorandum of the same date. There were three conferences between the insurance companies and plaintiff's representatives in January and February 1955 with respect to the bond purchase agreement. As a result, a memorandum of agreement was prepared. It was dated February 17, 1955, and provided in part as follows:

> 1. The Intercompany Agreement will be signed by Middle South and Southern, and not by the subsidiaries of either System.
>
> 2. In the Intercompany Agreement, Middle South and Southern in consideration of the right to receive power and energy, whether or not available, will agree to pay or cause to be paid an aggregate amount sufficient to provide revenue which, when added to revenue derived by MVG from AEC and any other sources, will be sufficient to enable MVG to pay, when due, all of its operating and other expenses and all of its taxes and to pay, when due, interest on and regular required amortization of the bonds and the notes.
>
> 3. The obligations of Middle South and Southern shall be several, separate and distinct, and in the amounts of 80% for Middle South and 20% for Southern. In cases where power and energy are purchased from MVG by any operating company of either System, assurance of payment for such power and energy shall be the responsibility of such operating company's parent company only.
>
> 4. In the Intercompany Agreement, Middle South and Southern will agree to pay or cause to be paid to MVG an aggregate amount sufficient to enable MVG to pay its expenses and taxes and service its debt (as per paragraph 2 above) in the event that MVG is unable otherwise to pay such expenses, taxes and debt service because of failure on the part of AEC or others to pay on schedule amounts due MVG for power and for energy, with the provision that any such payments by Middle South and Southern for this reason shall be repaid to Middle South and Southern by MVG after the amounts due from AEC or others have been collected by MVG.

5. The Intercompany Agreement *may* include a force majeure clause containing a requirement that non-delivery or non-availability of power or energy on account of force majeure shall not relieve Middle South and Southern from their respective obligations to pay MVG amounts necessary pursuant to paragraph 2 above.

* * * * *

7. There shall be executed as a condition precedent to the first bank closing a "supplemental and surplus power agreement" between MVG and the Arkansas, Louisiana and Mississippi companies of the Middle South System and the four Southern System companies, to which the seven subsidiaries shall be signatories, directly or indirectly, providing for the purchase by such subsidiaries from MVG of surplus power and energy, and the supplying to MVG of back-up power and energy. This agreement will not be pledged under the MVG mortgage.

The bank credit agreement, the bond purchase agreement, the intercompany agreement, and the back-up and surplus power agreement were thereafter prepared in final form, in substantial conformity with these agreements.

182. The bank loan agreement was executed on April 21, 1955, and article 1 thereof contained the following definitions:

a. *Back-up and Surplus Power Agreement:* The term "Back-up and Surplus Power Agreement" shall mean the agreement or agreements referred to in section 2.02 of the Power Contract.

* * * * *

j. *Intercompany Agreement:* The term "Intercompany Agreement" shall mean the agreement among the Company, the Sponsoring Companies, the Trustee under the Mortgage and The Chase Manhattan Bank as representative of the Banks, substantially in the form attached hereto and marked Exhibit A.

* * * * *

n. *Power Contract:* The term "Power Contract" shall mean, collectively, (i) the agreement dated November 11, 1954, No. AT(49–1)–814 between the Company and The United States of America, acting by and through the Atomic Energy Commission, as modified by Supplement No. 1 dated November 11, 1954, to said agreement No. AT–(49–1)–814, and (ii) the interpretive memorandum, dated November 11, 1954, with respect

to said agreement No. AT-(49-1)-814 with attached letter agreement of the same date between the Company and the Atomic Energy Commission, copies of all of which have been delivered to the Banks.

Article 6 is entitled "Conditions to Obligations of Banks at First Borrowing." Section 6.01 states that the obligations of each bank at the first borrowing shall be subject to the satisfaction of the conditions set forth in this article. Section 6.08, entitled "Contracts", provides:

> The Power Contract, the Intercompany Agreement, the Bond Purchase Agreements, the Engineering Agreement, and the Back-up and Surplus Power Agreement, shall have been duly entered into by the respective parties thereto.

The section further provides that except as the Power Contract may have been terminated or cancelled pursuant to the provisions thereof, or as the back-up and surplus power agreement may have been modified pursuant to its terms, "each of said agreements shall be in full force and effect and shall not have been terminated or modified otherwise than as permitted by the provisions thereof."

Article 7 is entitled "Conditions to Obligations of Banks at Secondary Borrowings." Section 7.01 provides that the obligations of the banks at any secondary borrowing shall be subject to the satisfaction, as of the secondary borrowing date, of the conditions set forth in section 6.08, among others.

183. The bond purchase agreements with the two insurance companies, also dated April 21, 1955, contained the same definitions of "back-up and surplus power agreement," "intercompany agreement" and "power contract," as the bank credit agreement.

Article 6 of the bond purchase agreement was entitled "Conditions To First Borrowing Under Bank Credit Agreement." Section 6.04 entitled "Contracts," required that the Power Contract, the intercompany agreement, the engineering agreement and the back-up and surplus power agreement shall have been duly entered into by the respective parties thereto. Section 7A.01 and 7B.01 required compliance with section 6.04 on each closing for bonds under the agreement.

The proposed mortgage and deed of trust securing the bonds, a copy of which was attached to the bond purchase agreement, provided that there should be pledged under said mortgage, among other things, all of plaintiff's right, title and interest under the Power Contract and the intercompany agreement. In section 5.26 of the mortgage, plaintiff was to covenant that:

> There will at all times be in effect an agreement between the Company and one or more subsidiaries of each Sponsoring Company making available to the systems of the Sponsoring Companies power and energy which from time to time is not needed by the Company to meet its obligations under the Power Contract, and containing provisions with respect to the payment for such power and energy, all as contemplated by paragraph 4 of the Intercompany Agreement. So long as the Power Contract remains in effect, there will also at all times be in effect an agreement between the Company and one or more subsidiaries of each Sponsoring Company complying with the provisions of clause (a) of the second sentence of Section 2.02 of the Power Contract.

184. The intercompany agreement, although not executed, had been prepared in final form and was attached as an exhibit to the bond purchase agreement. This was to be an agreement to be signed by plaintiff, the sponsors, the trustees under the mortgage securing the bonds, and a representative of the banks which had signed the bank credit agreement.

The recitals to the intercompany agreement read in part as follows:

> WHEREAS, it is anticipated that MVG will have available for sale to others, as provided in the Power Contract or after the expiration or earlier termination thereof, power and energy from its generating station to the extent not required to meet its obligations to the Atomic Energy Commission under the Power Contract; and
>
> WHEREAS, MVG desires to sell such power and energy to the systems of the Sponsoring Companies and they desire to be entitled to purchase the same, upon the terms and conditions herein set forth;

After reciting the obligations of the insurance companies to purchase bonds, and of the banks to make loans, the recitals continued:

> WHEREAS, the inducements to said insurance companies and said banks in agreeing to make said loans include the agreements of the Sponsoring Companies herein contained, including the agreements to pay for the right to purchase power and energy from MVG and to supply equity capital to MVG, all as herein provided; and

Paragraph 1 of the agreement provided as follows:

> 1. (a) MVG will make available or cause to be made available to the systems of the Sponsoring Companies all such power and energy as MVG may have available after fulfilling its obligations, if any, under the Power Contract. Such power and energy is herein referred to as power and energy.
>
> (b) The systems of the Sponsoring Companies will be entitled, in the respective percentages set forth in paragraph 3 (b) hereof, to purchase power and energy and, subject to the provisions of paragraph 3 hereof, the Sponsoring Companies will pay or cause to be paid, in such respective percentages, for the right hereby granted to purchase power and energy, whether or not MVG shall have any power or energy available, an aggregate amount sufficient to provide revenue which, when added to all other revenues, if any, of MVG, including amounts received upon sales to the Atomic Energy Commission and amounts received upon sales to companies in the systems of the Sponsoring Companies, will be sufficient to enable MVG to pay when due all its operating and other expenses and all its taxes, to pay when due interest and regular required amortization on all bonds outstanding under the Mortgage from time to time (herein called the "Bonds") as provided in the Mortgage, and to pay when due interest and Mandatory Regular Prepayments (under § 4.01 (A) of the Bank Credit Agreement) on the Notes as provided in the Bank Credit Agreement. The term "regular required amortization" shall not include payments on account of principal at rates greater than those initially set forth in the sinking fund or amortization schedules for the Bonds; and the term "operating and other expenses" shall not include any payments on the principal of indebtedness, whether at stated or accelerated maturity.

(c) If any company in the system of a Sponsoring Company shall default in making payment to MVG under any contract or other arrangement providing for payments by such company for power and energy which such system is entitled to purchase under paragraph 1 (b) hereof, or for the right to purchase power and energy, such Sponsoring Company will promptly make such payment or cause the same to be made. Any amount for which MVG shall have a valid claim against a Sponsoring Company under this paragraph 1 (c) shall be deemed to constitute an amount received upon sales to companies in the systems of the Sponsoring Companies, within the meaning of paragraph 1 (b) hereof, for the purpose, but only for the purpose, of determining the amounts, if any, due from the other Sponsoring Company. Except to the extent stated in the foregoing sentence, nothing in this paragraph 1 (c) shall be deemed to affect the obligation of the Sponsoring Companies, or either of them, under paragraph 1 (b) hereof.

Paragraph 3 (e) and paragraph 4 of the agreement provided as follows:

(e) MVG shall not be held responsible or liable for any loss or damage to the system of either Sponsoring Company on account of non-delivery or non-availability of power and energy hereunder at any time caused by Act of God, fire, flood, explosion, strike, civil or military authority, insurrection or riot, act of the elements, failure of equipment, utilization of the entire net available capacity of MVG in compliance with the Power Contract as in effect from time to time, or for any other cause beyond its control; and non-delivery or non-availability on account of any such causes shall not relieve the Sponsoring Companies from their respective obligations under the provisions of paragraph 1 hereof.

4. Subject to the provisions hereof, each Sponsoring Company or one or more of its subsidiaries will enter into an agreement or agreements from time to time with MVG or with MVG and the other Sponsoring Company or one or more subsidiaries of either Sponsoring Company, containing provisions, among others, relating to the purchase of and payment for power and energy. The Sponsoring Companies and their subsidiaries may provide in such agreement or agreements for deliveries of power and energy and payments therefor, as among themselves, other than in the percentages specified in paragraph 3 (b); but no such agreement shall be in derogation of this agreement or relieve either Sponsoring Company from its obligations hereunder, which ob-

ligations shall continue for the purposes hereof as if such other agreement or agreements provided for deliveries of power and energy and payments therefor on the basis of the percentages set forth in paragraph 3 (b) hereof. Each subsidiary of a Sponsoring Company shall make payments directly to MVG for all power and energy delivered to or for the account of such subsidiary (less any applicable credits for losses or for back-up or other power and energy delivered by such subsidiary to or for the account of MVG), and each such other agreement shall so provide. Copies of any such agreements, including amendments and supplements thereto, will be filed by MVG with the Trustee and with the Representative within five days after they become effective.

185. The back-up and surplus power agreement had not been executed, but was in substantially final form, and its execution had been authorized by the boards of directors of the subsidiaries who were to be signatories. This agreement was to be executed between plaintiff and the following subsidiaries of the sponsors: Mississippi Power & Light Company, Arkansas Power & Light Company, Louisiana Power & Light Company, Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, and was to continue until January 1, 1989, or the retirement of plaintiff's power plant from service, whichever should be later, unless sooner terminated by mutual agreement of the parties.

Section 0.2 defines the following terms as used in the agreement:

Back-up shall mean power and energy furnished to or for Mississippi Valley from time to time in order to enable it to continue service to the AEC as provided in Section 2.02 (a) and the first sentence of Section 3.01 of the Power Contract.

* * * * *

Power Contract shall mean the contract dated November 11, 1954, by and between Mississippi Valley and the United States of America, acting by and through the AEC—Contract No. AT-(49-1)-814-, Supplement No. 1 thereto dated November 11, 1954, and the Interpretative Memorandum re Power Contract, with covering letter dated November 11, 1954, all of which are included in Exhibit A hereto;

* * * * *

Surplus shall mean power and energy available from the Power Plant from time to time in excess of power and energy deliverable to the AEC under the Power Contract; * * *

With respect to the supply of back-up power to plaintiff, section 3.1 and 3.2 of said agreement provided:

3.1 *ALM Obligations as to Back-up:* Subject to the provisions of §§ 3.6 and 6.2, the ALM COMPANIES shall be obligated to supply and shall supply, in the aggregate, 80% of the BACK-UP power required by MISSISSIPPI VALLEY. The distribution of this obligation among such companies and accounting for payments received either in kind or in cash for BACK-UP energy so supplied shall be, as among the ALM COMPANIES, in accordance with the MEMORANDUM or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggregate loads of all of them.

3.2 *Southern Companies' Obligations as to Back-up:* Subject to the provisions of §§ 3.6 and 6.2, the SOUTHERN COMPANIES shall be obligated to supply and shall supply, in the aggregate, 20% of the BACK-UP power required by MISSISSIPPI VALLEY. The distribution of this obligation among such companies and accounting for payments received either in kind or in cash for BACK-UP energy so supplied shall be, as among the SOUTHERN COMPANIES, in accordance with the following percentages of the total BACK-UP or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggregate loads of all of them:

ALABAMA PC	8%
GEORGIA PC	8%
GULF PC	2%
MISSISSIPPI PC	2%

With respect to surplus power that might be generated by plaintiff, the agreement provided, in sections 4.1 and 4.2:

4.1 *ALM Entitlement to Surplus:* Subject to the provisions of § 6.2, the ALM COMPANIES together shall be entitled to receive an aggregate of 80% of SURPLUS power. Such SURPLUS power entitlement shall be distributed among the ALM COMPANIES in accordance with the MEMORANDUM or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggre-

gate loads of all of them. Subject to the provisions of this agreement, the scheduling of the SURPLUS to which the ALM COMPANIES are entitled shall be handled by the Middle South System Operator referred to in the MEMORANDUM or such other person as may succeed to the powers and functions of such System Operator.

4.2 *Southern Companies' Entitlement to Surplus:* Subject to the provisions of §§4.4 and 6.2, the SOUTHERN COMPANIES together shall be entitled to receive an aggregate of 20% of SURPLUS power. Such SURPLUS power entitlement shall be distributed among the SOUTHERN COMPANIES in accordance with the following percentages of the total amount of SURPLUS or with such other basis on which they may mutually agree reflecting a rational relationship of the load of each such company to the aggregate loads of all of them:

ALABAMA PC	8%
GEORGIA PC	8%
GULF PC	2%
MISSISSIPPI PC	2%

186. The intercompany agreement was not required by the terms of the Power Contract. It was a lending document which was to be pledged to secure the payment of MVG's debt. As already stated, it was decided that the intercompany agreement should be signed by both sponsors and that none of the operating subsidiaries of the sponsors would sign it.

The back-up and surplus power agreement was required under section 2.02 of the Power Contract and, as stated, it was to be signed by plaintiff and by the subsidiaries of the sponsors. As security for the bonds, the insurance companies had a first mortgage on MVG's plant, a pledge of the Power Contract, and a pledge of the intercompany agreement, which the insurance companies relied upon as an obligation of the sponsors to pay for the right to receive power from MVG, whether or not the power was available. Although the intercompany agreement provided that the back-up and surplus power agreement would be entered into, the intercompany agreement did not specify the terms to be contained in the back-up and surplus power agreement. It was an operating agreement and not a lending document. The lending institutions were not interested in the provisions of the back-up and surplus power agreement. However, since the sponsors were holding companies, the

lending institutions wished to make sure, as a matter of mechanics, that there should be an agreement in effect for the surplus power to be taken by the operating subsidiaries.

187. With respect to the back-up and surplus power agreement, the SEC in its decision of February 9, 1955, stated that the record before it indicated that the operating companies would be fairly treated in the amounts they would receive for interim and back-up power and in the amounts they would be charged for any surplus power they took.

188. In the SEC equity financing proceedings, the SEC Division of Corporate Regulation filed a reply brief (plaintiff's exhibit 21–I) in which it was urged, among other things, that the Power Contract and related arrangements, did not violate Section 12 (a) of the Public Utility Holding Act of 1935. After pointing out that the back-up and surplus power agreement was a direct obligation of the operating subsidiaries rather than of Middle South or Southern, the brief stated:

> We submit that, under all of the circumstances, no indemnity of the type envisaged by section 12 (a) of the Act is or will be created by the Power Contract and the related intercompany arrangements.

189. In its decision of February 9, 1955, approving MVG's equity financing, the SEC stated:

> We do not consider that any indemnity within the meaning of Section 12 (a) is involved. The obligation to supply MVG with interim and back-up power and to absorb cancelled power would be the direct obligation of the operating companies, not of the holding companies. While the arrangements among the system companies have not been finally determined, the record shows that the arrangements for the supply of back-up energy interim power, and absorption of power will be between MVG and the operating companies of each system, that MVG will pay those subsidiaries for such power, and neither Middle South nor Southern will obtain any payments from the AEC for power. It is proper under the Act for construction projects and operations to be planned and carried forward on a basis meeting the purposes of the system as a whole, and for the holding company to make contracts in furtherance of such coordinated operations with the intent that the operating aspects of such contracts shall be carried out by the system operating companies. The

creation of the attendant reciprocal benefits and undertakings involved in such arrangements does not in our view automatically result in an indemnity of the holding company within the meaning of Section 12 (a).

VI. LACK OF REGULATORY APPROVALS DEFENSE [5]

190. Section 8.15 of the Power Contract is as follows:

Regulatory Approvals and Indebtedness: The obligations of the parties hereunder shall be subject to the following:

(1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;

(2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract;

* * * * *

Section 8.22 of the Power Contract is as follows:

Effective Date: The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to the Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

191. As previously stated (findings 8 and 9), the Power Contract became effective on December 17, 1954. Both parties agreed that those provisions of section 8.22 of the Power Contract which were covered by the letter agreement had been satisfied, that the Power Contract was effective, and that the letter agreement was no longer in force.

[5] Paragraph 25 of defendant's answer.

192. On November 17, 1954, plaintiff, Middle South and Southern filed with the SEC an application to authorize plaintiff to issue 55,000 shares of its common stock having a par value of $100 per share and to permit Middle South to acquire 43,450 of such shares and Southern to acquire the remaining 11,550 shares, all having an aggregate par value of $5,500,000.

Hearings on the application began in the SEC on December 7 and were concluded December 21, 1954. The State of Tennessee and the Memphis Light, Gas & Water Division appeared in opposition to the application.. The findings and opinion of SEC approving the issuance and sale of plaintiff's common stock were issued February 9, 1955.

The State of Tennessee filed a petition for rehearing and this was denied by the SEC on February 18, 1955. On March 14, 1955, the State of Tennessee filed a petition for review of the SEC order in the United States Court of Appeals for the District of Columbia.

After intervening in the action in the Court of Appeals, plaintiff, Middle South, and Southern filed a motion to dismiss Tennessee's petition for review on April 13, 1955. Oral argument was heard on the motion and the Court of Appeals deferred its decision until after argument on the merits.

193. The Court of Appeals heard oral argument on the appeal of the State of Tennessee on June 6, 1955, but no decision was rendered prior to defendant's termination of the contract in July 1955. On September 12, 1955, the Court of Appeals remanded the case to SEC for reconsideration of its order of February 9, 1955. The court's action was taken pursuant to SEC's motion to remand in view of the fact AEC had been directed to cancel the Power Contract. The court's order of remand stated:

> The Court expresses no view with respect to the questions in controversy between the parties, and nothing in this order shall be deemed decisive of any such question. This order is without prejudice to any right, which may be possessed by any person aggrieved, to judicial review of the Commission's final action in the matter.

194. By the time the Power Contract was terminated, MVG had issued and sold to Middle South and Southern only 11,000 shares of common stock, whereas the remaining 44,000 shares of common stock, the issuance and sale of which had been authorized by the SEC order of February 9, 1955, had not been issued. On November 4, 1955, SEC entered an order in which reference was made to the order of February 9, 1955, to the proceedings in the Court of Appeals, to defendant's cancellation of the contract, and to the remand by the Court of Appeals. In view of such circumstances, the SEC entered an order rescinding the authority of the plaintiff to issue and of Middle South and Southern to acquire the 44,000 unissued shares of the common stock of MVG. SEC retained jurisdiction of the question as to the action to be taken respecting the 11,000 shares of plaintiff's common stock that had been acquired by Middle South and Southern.

195. On April 22, 1955, plaintiff advised AEC that bond purchase agreements, involving an estimated total commitment of $77,362,000 by the Metropolitan Life Insurance Company and New York Life Insurance Company, had been executed on April 21, 1955. In the same letter AEC was informed that bank credit agreements, involving an estimated total commitment of $27,086,000 by 24 banks, had been executed on April 21, 1955. The bonded indebtedness was to be secured by 3⅝ percent first mortgage bonds, and the debt to the banks was to be secured by the execution and delivery of notes bearing interest at 3¼ percent. All participating banks had signed the bank credit agreement by May 15, 1955.

196. Plaintiff's application for approval of the financing to be obtained from the insurance companies and the banks was filed with the SEC on April 22, 1955. A hearing on the application was set for May 6, 1955, but postponed until June 6, 1955. The hearing began on June 7 and ended on June 17, 1955. The SEC had made no decision on the application as of July 11, 1955, when the defendant decided to cancel the Power Contract.

197. On November 23, 1954, plaintiff and the sponsors filed with the Arkansas Public Service Commission an applica-

tion to authorize plaintiff to issue and the sponsors to acquire shares of plaintiff's common stock. An order approving the application was entered on December 21, 1954.

198. On December 29, 1954, plaintiff applied to the Commissioner of Internal Revenue for approval of plaintiff's proposed method of charging depreciation, and this method was accepted by the Commissioner on March 8, 1955.

199. On January 3, 1955, plaintiff applied to the District Engineer of the Memphis District of the Corps of Engineers for permission to construct coal unloading and water condensing structures in the Mississippi River, West Memphis, Arkansas. The permit was granted February 11, 1955.

200. On February 18, 1955, plaintiff applied to the Arkansas Public Service Commission for a certificate of Public Convenience and Necessity. After a hearing, the Commission granted the certificate on March 9, 1955.

201. In March 1955 certain officers and directors of Middle South and Southern, including Yates and Barry of Southern, and Dixon, Canaday, and Sanders of Middle South, filed an application to hold interlocking positions on plaintiff's board pursuant to the provisions of Section 305 (b) of the Federal Power Act and Part 45 of the Rules and Regulations of the Commission.

On April 4, 1955, the State of Tennessee intervened in the proceedings and objected to the approval of the applications. As of May 4, 1955, both parties had filed a memorandum of law with the Commission but no action had been taken by it. On July 2, 1956, each application was withdrawn by the applicant on the ground that on July 30, 1955, the AEC had advised MVG that AEC had been directed to terminate the Power Contract.

202. Among the regulatory approvals that were contemplated by section 8.15 (1) of the Power Contract was the approval by the Civil Aeronautics Authority of the lighting of the transmission towers. Such approval could not have been obtained until near the end of the construction period.

203. (a) The question of the extent to which the effectiveness and enforceability of the Power Contract were affected by the lack of regulatory approvals was fully treated in the opinion the General Counsel of AEC submitted to the

Atomic Energy Commission on July 11, 1955. The opinion read in part as follows:

> * * * those described in paragraphs (1) and (2) [of Section 8.15] have not been fully satisfied at this date. A question has been raised as to whether the conditions stated in Section 8.15 limit the effectiveness of the contract so that the contract will not become effective and binding on the parties until these conditions are fully satisfied.
>
> The intention of the parties, as derived from the contract as a whole, is clear—that the contract was to become effective on the date specified in Section 8.22 (December 17, 1954). Section 8.15 does not purport to fix the effective date of the contract. It is significant that conditions (3) and (4) of Section 8.15 are identical with events (b) and (c) of Section 8.22. In Section 8.22 these two events must occur before the contract becomes effective. The inference is clear that the other two conditions of Section 8.15; viz, the receipt of regulatory approvals and the execution and performance of financing commitments, do not go to the effective date and do not prevent the contract from being presently in effect.
>
> An interpretation of Section 8.15 as imposing limitations on the effectiveness of the contract would be clearly inconsistent with other substantive provisions of the contract. Condition (2) of Section 8.15 involves the the execution and performance by institutional investors and banks of contracts or commitments providing for the issuance by the Company and the purchase by such investors and banks of the Company's long-term debt issuances. It was clearly understood by the parties that the performance of these financing arrangements would involve a serious [series] of transactions providing for the periodic take-down of funds by MVGC during the period of construction of its plant. The last of these transactions would undoubtedly occur towards the end of the construction period—at a date two years or more after the effective date of the contract. If the binding effect of the contract were to be delayed until performance of the last of these transactions, then all of the provisions of the contract bearing on the rights and obligations of the parties during the construction period would be nugatory until that last transaction was completed. The obligations of MVGC to design and construct the Plant would be unenforceable. The company's obligation to supply Preliminary Contract Capacity upon completion of the first generating unit

would be unenforceable if such completion preceded the completion of the last financing transaction. The right granted to AEC under Section 7.07 to assign to TVA the right to power under the contract, and the rights and obligations of the parties in the event of cancellation of the contract during the construction period would all be meaningless if the contract were not to be effective during the construction period. During this period, the valuable right of the Government to recapture the plant under the provisions of Section 7.09 would be an illusory one. MVGC would not be bound by the many statutory and regulatory requirements, such as those contained in the Anti-Discrimination, Security and Eight-hour law provisions of the contract. Certainly, the parties could not have intended—and did not intend—that all of these provisions, so carefully negotiated to fix the rights and obligations of the parties during the construction period, were to have no force and effect until the last borrowed dollar had been paid over by the lending institutions.

* * * * *

It is my opinion that the conditions stated in Section 8.15 are conditions subsequent—such conditions that the non-occurrence of any one of them may excuse the parties from further performance of the contract. Thus, if it should develop at some future date that the Company was unable, after a reasonable time, to obtain the requisite regulatory approvals and debt financing, both parties would be relieved of liability on account of any failure to perform thereafter their contract obligations. The existence of these conditions subsequent imposes upon the parties certain obligations in the form of implied conditions of the contract. There is an implied obligation on both parties to proceed in good faith and with due diligence to perform such actions as may be required of the respective parties in order to permit the satisfaction of the conditions. AEC has satisfied its obligation in this respect by furnishing to MVGC the opinions referred to in Conditions (3) and (4). MVGC has proceeded with due diligence to take the necessary steps towards obtaining the required regulatory approvals and has executed the agreements for its debt financing.

There is a further implied obligation of the parties in this situation to refrain from any action that would prevent the fulfillment of any of the conditions subsequent. A party would not be relieved of its obligations under the contract due to the non-fulfillment of one of the conditions if the failure to fulfill the condition were

due to its own action. If, for example, AEC were to repudiate the contract and, as a result of that repudiation, SEC failed to approve the MVGC debt financing, AEC could not assert that it was relieved of its obligations under the contract because of the non-fulfillment of Condition (1) of Section 8.15.

(b) Substantially the same conclusion was expressed in the Comptroller General's opinion (plaintiff's exhibit 96) sent to the AEC on July 28, 1955.

(c) In the brief which the United States filed as *amicus curiae* in the Court of Appeals before the contract was terminated (plaintiff's exhibit 28), there was a statement which is in accord with the material quoted in (a) above.

VII. LACK OF MUTUALITY DEFENSE

204. In this defense, which is set forth in paragraph 26 of defendant's answer, the defendant is relying upon the provisions of section 8.15 of the Power Contract. Aside from the provisions of the Power Contract (plaintiff's exhibit 1), no evidence was offered in support of this defense.

VIII. DAMAGES

A. *General*

205. The only provisions of the Power Contract relating to termination and cancellation are sections 7.02 and 7.07. The first of these, which is entitled "Termination", is applicable only after the commencement of commercial operation of the third unit of the plant, or 42 months after the effective date of the contract, whichever is earlier. Section 7.07 is entitled "Cancellation Prior to Completion" and provides in part as follows:

> 1. If, prior to the commencement of commercial operation of the third unit of the Facilities, the power requirements of the AEC at the Projects are so reduced that it will no longer require service hereunder, the AEC may assign to TVA the right to power and energy hereunder in accordance with the terms hereof. Acceptance of such assignment by TVA and notice thereof to the Company by the AEC shall have the effect of the delivery of a notice of termination by the AEC at the earliest date possible under Section 7.02. If the AEC advises TVA that such assignment to it

is available and ascertains that TVA has concluded that it does not need the power hereunder during the period which such assignment would cover, the AEC shall be entitled to cancel this contract by delivering a written notice of cancellation to the Company, and such notice shall have the effect set forth in paragraph 2 or paragraph 3 of this Section, whichever is applicable.

2. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company prior to the time when the Company shall have incurred expenditures on account of the cost of the Facilities as referred to in Section 4.02 which, together with the costs (estimated where necessary) of cancellation of commitments made in that connection, shall equal $40,000,000, this contract shall terminate on such date after the delivery of such notice as shall be specified therein. In such event, the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable liabilities, costs, indebtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, including carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; and the AEC shall be entitled to, and shall remove from the site of the Facilities at its own cost and expense and within a reasonable time, all items of personal property theretofore acquired by the Company and not returned or returnable to a vendor in connection with the cancellation or revocation of a contract or commitment, and may remove from the site of the Facilities at its own cost and expense and within a reasonable time all items of property acquired by the Company which have been so attached to the land or any structure thereon as to become realty, provided any injury to the land caused by such removal shall be made good. The AEC shall have the right, in lieu of reimbursing the Company for cancellation charges or payments on any purchase contract or order, to take over such purchase contract or

order upon the agreement by the AEC to assume all liabilities thereunder and hold the Company harmless therefrom. The AEC shall make payment of amounts payable hereunder from time to time and as soon as practicable to the end that the aggregate amounts payable by it hereunder shall be reduced so far as possible and the Company will undertake to cooperate with the AEC for that purpose.

206. In section 1.09 of the Power Contract, "Project" is defined to include an AEC installation at Oak Ridge, Paducah, or Portsmouth, or "any other installation for which it may become lawful for the AEC to receive electric utility service under this contract."

As previously stated, AEC has no installation at West Memphis, Arkansas, or in that area.

At the time the Power Contract was cancelled, there had been no reduction in the power requirements of AEC at its Oak Ridge, Paducah, or Portsmouth installations. Instead, AEC then needed additional power at its Oak Ridge installation. The defendant did not cancel the contract as a result of a reduction in AEC's requirements for power at any of its installations. It cancelled the contract when the city of Memphis decided to erect its own generating facilities and the defendant determined that it would have no need for the power to be generated by plaintiff's plant.

In the discussions between plaintiff's representatives and AEC after August 1, 1955, plaintiff's representatives took the position that the provisions of section 7.07 of the Power Contract applied to the cancellation. Plaintiff's representatives offered to waive that portion of section 7.07, which related to reductions in the power requirements of AEC, but the offer to waive was not accepted by AEC.

207. MVG was organized for the sole purpose of making the Power Contract and for constructing and operating the facilities provided for therein. Until the date of termination, MVG had engaged in no business other than that directly concerned with the Power Contract and the construction of the facilities contemplated in the contract.

Except for activities directly related to the cancellation of the contract and the prosecution of this action, the only business activity which MVG has engaged in since termina-

tion has been the renting of the plant site for farming purposes.

B. *Mitigation of Damages*

208. When plaintiff learned by telephone on July 11, 1955, that the President had decided to order termination of the Power Contract, it immediately notified Ebasco. On July 15, 1955, Ebasco was directed to stop all work on the project, to terminate all purchase orders, to cancel all contracts, and to transfer all personnel at the site except employees needed to shut down the job. On July 13, 1955, Ebasco discussed cancellation of purchase orders with the Westinghouse Electric Corporation and the Babcock & Wilcox Company. By July 30, 1955, all contracts at the site had been terminated and work on the major items of equipment had been suspended. The personnel at the site had been removed as rapidly as possible and the engineering work was terminated to the fullest extent practicable.

AEC did not give plaintiff formal notice of termination until August 1, 1955. Although there were some discussions about plaintiff's obligations to third parties and as to steps that could be taken to minimize the damages, the AEC representatives told plaintiff that AEC had received no directive as to post-termination activities and could not give plaintiff any instructions pertaining thereto. Plaintiff continued to keep AEC informed as to the steps it was taking to close out the project until AEC ended the post-termination discussions in October 1955. The evidence shows that plaintiff was diligent in its efforts to mitigate damages following defendant's termination of the contract.

209. Since the filing of the petition, the following claims described in paragraph 16 of the petition have been withdrawn without cost to either party:

The Babcock & Wilcox Company	$204, 216. 40
Bowers & Wood Manufacturing Co	15, 978. 72
Elliott Company	11, 890. 02
Fisher Steel Corporation	14, 949. 20
The Griscom-Russell Company	5, 361. 60
Westinghouse Electric Corporation	1, 208, 743. 00
Worthington Corporation	6, 613. 92
Total	1, 468, 352. 86

C. *The Claim of Dickmann-Pickens-Bond Construction Co.*

210. This claimant entered into a contract with Ebasco, as agent for plaintiff, for the furnishing, driving, and concreting of the concrete piles for the facilities to be constructed pursuant to the Power Contract at West Memphis. At the time of termination, the claimant had moved equipment to the site but had driven no piles. The parties have agreed that the sum of $14,553.03 is a fair and reasonable charge for the services performed, and that if the court determines that the defendant is liable on the merits and is obligated to reimburse plaintiff for the services of the claimant, judgment may be entered in the amount stated above.

D. *The Claim of Jackson Life Insurance Company*

211. This claim was settled by plaintiff. The amount of the settlement is included in plaintiff's claim and the facts pertaining thereto are set out in the findings relating to plaintiff's claim.

E. *The Claim of J. A. Jones Construction Company*

212. Pursuant to written contract entered into between Ebasco, as agent for MVG, and the J. A. Jones Construction Company, the claimant, its joint venturers and subcontractors, performed work at the site, including yard grading, embankment filling, the concreting of foundations, and related work. It has been stipulated that the fair and reasonable value of the work is the sum of $243,160.33, of which plaintiff has paid $100,000 that is now included in its claim. The parties have agreed that the unpaid balance of $143,160.33 includes an item of $11,027.79 due the Oman Construction Company for the rental of equipment, and that if judgment is entered for $143,160.33 on this claim, the $11,027.79 may be deducted for direct payment to Oman Construction Company.

F. *The Claim of Pandick Press, Inc.*

213. This claim is for the cost of printing documents for plaintiff. In connection therewith, the parties have agreed that the categories of documents printed and the amounts

which are the fair and reasonable costs of the services performed by the claimant as to each category are as follows:

Contract Drafts	$17,412.97
Corporate Organization	300.96
Financing	16,170.84
SEC Approval	5,394.65
Back-up and Surplus Power Agreement	1,608.81
Court of Appeals Proceedings	2,450.53
Total	43,338.76

Plaintiff has paid $5,000 on account to the claimant, leaving a balance of $38,338.76 due. The $5,000 is included as a part of plaintiff's claim hereinafter set out.

Defendant reserved the right to contend that any or all of the work performed by the claimant is not a proper item of damage. The following is a brief summary of the facts relating to each category of printing:

(1) The item of $17,412.97 covers the cost of printing numerous copies of many drafts of the contract documents. As previously stated, nine separate proofs of the Power Contract were printed during the period of the negotiations. As a particular proof became unusable, it was mutually agreed that new proofs would be obtained. The number of copies to be printed was generally based on the number of copies requested by the AEC, since plaintiff's representatives did not use many copies.

(2) The item of $300.06 is for the cost of printing the articles of incorporation and the bylaws of plaintiff in connection with its corporate organization.

(3) The sum of $16,170.84 is the amount charged for printing the mortgage and deed of trust, the bond purchase agreement and the bank credit agreement. These costs were incurred in connection with the financing obtained by plaintiff from institutional investors and banks as referred to in section 8.15 (2) of the Power Contract.

(4) The item of $5,394.65 covers the costs of printing various documents filed by plaintiff with the SEC in connection with its efforts to obtain SEC approval of its equity and debt financing pursuant to section 8.15 (1) of the Power Contract.

(5) The sum of $1,608.81 represents the cost of printing the back-up and surplus power agreement which MVG was

required by section 2.02 of the Power Contract to enter into with the eight subsidiaries of the sponsors.

(6) The item of $2,450.53 covers the cost of printing briefs and other documents filed in the Court of Appeals in connection with the appeal from the SEC order in the equity financing proceedings.

G. *The Claim of Reid & Priest*

214. The claimant is a law firm which was retained by plaintiff about July 22, 1954, to render legal advice with respect to Federal, State, and local taxes, but the legal services were limited almost entirely to matters relating to Federal taxes. The services included consultation with officers of plaintiff regarding the tax consequences of the proposed power contract, analysis of the proposed contract in light of the provisions of the Internal Revenue Code, and tax advice regarding language to be included in the proposed contract. The firm also prepared and filed an application pursuant to section 4.09 of the Power Contract for a ruling from the Internal Revenue Service on the tax consequences of sinking fund depreciation with respect to the proposed West Memphis plant.

The parties have agreed that the sum of $6,500 is a fair and reasonable fee for the services performed and that the firm incurred disbursements of $597.12. The parties have also stipulated that if the plaintiff is entitled to recover and that if defendant is obligated to reimburse plaintiff for claimant's services, judgment in the sum of $7,097.12 may be entered on this claim.

H. *The Claim of House, Moses & Holmes*

215. This law firm, now known as House, Holmes, Roddy, Butler & Jewell, was retained shortly after plaintiff was incorporated under the laws of Arkansas on July 19, 1954, to represent plaintiff on legal matters in Arkansas. The firm rendered opinions as to plaintiff's legal status in Arkansas and obtained from the Arkansas Public Service Commission (a) a certificate of Public Convenience and Necessity, (b) authority for the issuance and sale of plaintiff's common stock, and (c) authority for plaintiff's debt fi-

nancing. The firm also rendered an opinion as to plaintiff's liability under Arkansas tax laws.

The parties have agreed that if the court holds that defendant is liable and is obligated to reimburse plaintiff for the value of such service, a judgment in the sum of $7,500 may be entered on this claim.

I. *The Claim of Arthur Andersen & Co.*

216. This firm was retained by plaintiff to render accounting services to it. The major categories of work performed, and the charges therefor, which are reasonable, were as follows:

(a) Assistance and consultation on accounting matters applicable to power contract with AEC	$3, 635. 71
(b) Preparation of projections of debt amortization, depreciation and income for statements used in application to Treasury Department	3, 976. 42
(c) Preparation of memorandum on accounting matters relating to power contract and discussion thereof with staff of FPC and AEC	329. 29
(d) Review and consultation on accounting aspects of indenture, bond purchase agreement, bank credit agreement and supplementary agreement	321. 43
(e) Preliminary review of Ebasco charges, and review of final engineering and construction costs	851. 00
(f) Review and consultation on Ebasco's proposed construction estimating and cost control procedures	1, 253. 14
(g) Preparation of various monthly reports of expenditures made and obligations incurred	1, 033. 29
(h) Assistance in preparation of preliminary memorandum of accounting records, procedures and forms	516. 15
(i) Consultation and advice from time to time on miscellaneous accounting matters	332. 14
(j) Examination of February 28, 1955, balance sheet required to be filed with bond purchasers under proposed bond purchase agreement	617. 43
(k) Review of proposed procedures for settlement of claims of contractors and venders in connection with cancellation of contract	3, 442. 57
(l) Miscellaneous and unclassified	295. 43
TOTAL	16, 604. 00

These services were performed, and disbursements were made during the following periods of time:

	Fee	Disbursements
July 26 through November 10, 1954	$6,377.86	$440.21
November 11, 1954 through July 11, 1955	6,416.71	147.69
July 12, 1955 through October 12, 1956	3,809.43	757.33
TOTAL	16,604.00	1,345.23

However, due to minor bookkeeping discrepancies, this firm billed plaintiff for a fee of only $16,425 and disbursements of $1,344.66. Plaintiff has paid $1,300 on the account and that payment is included in its claim. The payment reduces Arthur Andersen & Company's claim to the net amount of $16,469.66.

J. *The Claim of Middle South Utilities, Inc.*

217. The claimant is one of two parent companies of the plaintiff. The parties have stipulated that the books of the claimant reflect an account receivable from the plaintiff in the amount of $4,651.86, consisting of the following:

Expenses applicable to so-called equity proceedings before the SEC	$4,455.37
Telephone toll calls	160.16
Express charges	16.61
Photoprints	6.43
Hotel expense	13.29

The parties have also agreed that such charges are fair and reasonable for the articles purchased or the services performed. However, with respect to the first item of $4,455.37, it is the defendant's position that this amount is not a proper charge against either the plaintiff or the defendant. The disputed item of $4,455.37 includes the sum of $2,429.63 paid for three copies of the transcript of the SEC hearing on MVG's stock financing, and $2,025.37 paid for the printing of documents filed in the same SEC proceeding. One copy of the transcript referred to was for examination, study, and use by the officers and employees of plaintiff and of Middle South in Washington, D. C., during and after the pendency of proceedings before SEC;

a second copy was for the examination, study, and use by the officers and employees of plaintiff and Middle South in New York, N. Y., during and after the pendency of the proceedings before SEC, and the third copy was for examination, study, and use by the law firm of Cahill, Gordon, Reindel & Ohl, which was counsel for plaintiff and for Middle South in the SEC proceedings. The sum of $1,619.75 of the amount paid for copies of the transcript was an unnecessary expenditure and is not a proper charge against either plaintiff or defendant.

The Power Contract recited that Middle South and Southern had caused MVG to be organized and had agreed to subscribe to and purchase its capital stock. As previously stated, section 8.15 of the Power Contract provided that the obligations of the parties thereunder were subject to the receipt of the regulatory approvals that were needed to permit plaintiff to issue and sell shares of its capital stock to Middle South and Southern. Middle South and Southern joined in the application filed by MVG in SEC, because it was necessary under Section 10 of the Public Utility Holding Act of 1935 for Middle South and Southern, as holding companies, to obtain SEC authority to acquire the common stock of MVG.

K. *The Claim of The Southern Company*

218. This claimant is the other parent company of plaintiff. The parties have stipulated that the books and records of Southern reflect an account receivable from plaintiff in the amount of $29,391.29, of which $6,095.43 represents amounts expended directly by Southern and the balance of $23,295.86 represents payments made by Southern to Southern Services, Inc., for professional services. It is also agreed that the amounts paid are fair and reasonable costs for the articles purchased and the services performed.

Southern's claim includes the following categories of expenditures:

Cost of transcript of proceedings before Joint Committee on Atomic Energy	$1,843.20
Cost of printing U-1 material to be filed with SEC re equity financing	1,254.54

Cost of transcript of oral argument before SEC	$133.41
Cost of transcript of proceedings before SEC on equity financing	2,420.40
Cost of printing U-1 material to be filed with SEC re debt financing	643.88
Payments to Southern Services, Inc., for salaries, overhead and travel expenses of its personnel on the following categories of work:	
(a) Assistance in formulating the proposal of April 10, 1954 to AEC	2,446.55
(b) Assistance in negotiating the power contract	2,999.28
(c) Studies with respect to the integration of plaintiff's power facilities with the Southern system, as required by the power contract, and preparation for and presentation of evidence relating thereto at the SEC equity proceedings	13,547.82
(d) Study and advice in connection with plaintiff's proposed power arrangements with systems of the sponsoring companies as contemplated by Section 2.02 of the power contract	650.45
(e) Study and advice in connection with plaintiff's arrangements with Ebasco for engineering and construction services in relation to plaintiff's facilities	1,934.42
(f) Participation in work of joint AEC-TVA-MVG Committee for cooperation established for purposes of compliance with Section 2.03 and similar requirements of the power contract	1,717.34

Defendant contends that the first five items in the foregoing table represent costs incurred by Southern in seeking authority from SEC to acquire plaintiff's stock and that such expenditures are not a proper charge against either plaintiff or defendant. As stated in the preceding finding, Southern and Middle South joined plaintiff in the application filed with SEC in order to obtain approval for Middle South and Southern to purchase plaintiff's common stock, as required by Section 10 of the Public Utility Holding Act of 1935. The sums expended by Southern in the SEC proceeding include $3,808.35 paid directly by it, and $13,547.82 (item (c) in the table above), paid to Southern Services, Inc.

In addition to its general contention respecting Southern's expenses in the SEC stock proceeding, defendant takes the position that the amounts paid for a transcript of proceedings before the Joint Committee on Atomic Energy ($1,643.20), for a transcript of the oral argument before SEC ($133.41), and for a transcript of the equity proceedings before SEC ($2,420.40) were unnecessary and unreasonable. Three copies of each of the transcripts were purchased. One copy was for the use of Southern in New York where the chairman of the board had his office, one copy was for Southern's use in Birmingham, Alabama, where the chairman of the executive committee had his office, and the third copy was for the use of Southern's counsel, Winthrop, Stimson, Putnam & Roberts. The sum of $2,798.01 of the amount paid for copies of such transcripts was an unnecessary expenditure and is not a proper charge against either plaintiff or defendant.

Defendant denies liability for the remainder of the items listed in the table and which are amounts paid to Southern Services, Inc., on the ground that the interpretative memorandum entered into between plaintiff and AEC on November, 11, 1954, contained the following provision:

> SECTION 4.02. It is understood that the cost of the Facilities, as defined in the second sentence of this Section, shall not include any travel or similar expenses incurred by or salary paid to any officer or employee of Middle South Utilities, Inc. or The Southern Company in the preparation and presentation of the proposals made by the Company to AEC or in the negotiation of the Contract. The foregoing statement is not intended to create any implication as to the allowability or non-allowability of any other item of cost.

L. *The Claim of the Arkansas Power & Light Company*

219. The claimant is a utility company which agreed with plaintiff to supply the temporary electric power and energy required during the construction of the plant at West Memphis. The claimant made expenditures in installing the electric facilities at the site and incurred costs in the removal of the facilities upon advice that the contract had been cancelled and that plaintiff had no need for the power.

The parties have stipulated that if the court holds that plaintiff is entitled to recover on the claim, the amount of the recovery shall be the sum of $7,484.09.

Frequently, the Arkansas Power & Light Company builds temporary facilities to furnish power at a site during the construction of a plant. Generally, the company makes no charge for installing and removing the facilities but looks to the revenue derived from the sale of power for its profit on the transaction.

Sometime during June 1955, the president of the Arkansas Power & Light Company wrote plaintiff, offering to provide power on the basis of a stated minimum charge to be paid by plaintiff during the entire construction period. Plaintiff considered that the quoted minimum charge was too high, and Canaday telephoned claimant's president that the proposal was unacceptable to plaintiff. Thereupon, claimant's president replied that his company would proceed to erect the facilities and that the basis of its compensation could be worked out later. The Power Contract was terminated before an agreement as to the consideration to be paid the claimant was made. Thereafter, the Arkansas Power & Light Company submitted the above described claim to plaintiff.

M. *The Claims of The First National City Bank of New York and of White & Case*

220. These claims are treated together, since the same facts pertain to each.

The bank had been selected as trustee in the proposed mortgage and deed of trust to be executed by plaintiff as security for the payment of its bonds. The mortgage and deed of trust was prepared, printed, and dated as of April 1, 1955, but it was never signed. Article 15, section 15.01 of the mortgage (plaintiff's exhibit 43, p. 137), provided that the trustee would receive reasonable compensation for all services rendered by it and that such compensation, plus reasonable compensation of the trustee's counsel and reasonable expenses incurred by the trustee, would be paid by plaintiff on demand from time to time as the services were rendered or the expenses incurred.

The services performed by the bank as prospective trustee included the review of various proofs of the proposed mortgage, the proposed bond purchase agreement, the proposed intercompany agreement, and the proposed bank credit agreement. The trustee also consulted with White & Case, its counsel, and studied the documents described above to determine whether they were administratively workable and were satisfactory from the standpoint of the trustee.

The law firm of White & Case, counsel for the trustee, reviewed the various proofs of the documents referred to in the preceding paragraph, as well as a draft of proposed excerpts from minutes of the meeting of plaintiff's stockholders and a draft of proposed excerpts from minutes of the meeting of plaintiff's board of directors. The firm also rendered advisory service to the trustee regarding these documents for the purpose of ascertaining that they afforded the customary protection to the trustee and would be satisfactory from its standpoint.

No written contract or other agreement was entered into between plaintiff and the trustee or between plaintiff and White & Case for the payment of the services included in these claims. However, since the mortgage and deed of trust provided for the payment of compensation to the trustee and to its counsel and since the services were rendered by both at plaintiff's request, plaintiff's position is that it is obligated to pay them. The parties have agreed that if the court determines that plaintiff is entitled to recover herein and is obligated to reimburse plaintiff for the services performed by the bank and by White & Case, judgment may be entered on the bank's claim in the amount of $500 and on the claim of White & Case for $500.

N. *The Claim of Mississippi Valley Generating Company*

221. Plaintiff in its own right claims the sum of $618,674.85, consisting of the following major items:

Payment to Ebasco on 1954 billing	$216, 559. 47
Payment to Ebasco as agent for MVG	183, 861. 29
MVG charges	218, 254. 09

The claim has been audited, and it has been agreed that the amount stated above correctly reflects the entries on the books of MVG. However, MVG overpaid Ebasco's 1954

bill by the sum of $16.78, which is to be deducted from the claim.

(a) Payment to Ebasco on 1954 Billing

222. Ebasco commenced working for plaintiff about March 1, 1954, under work orders. The working agreement between the parties was resolved into a written contract which became effective April 20, 1955. Ebasco performed many services for plaintiff and incurred a substantial amount of expenses in plaintiff's behalf before the MVG-Ebasco contract was effective.

223. On June 1, 1955, Ebasco submitted to plaintiff a bill for $216,559.47 covering Ebasco's services in the period from March through December 1954. Plaintiff paid the bill on June 8, 1955, charging $208,845.63 thereof to an account entitled "Construction Work in Progress", and the balance of $7,713.84 to "Unamortized Debt Discount and Expense."

224. It is defendant's position that the amounts paid by plaintiff to Ebasco in 1954 do not represent the fair and reasonable value of the services performed and the costs incurred by Ebasco and that such charges were not necessary or proper for the performance of the contract.

225. With the exception of the amount of $7,713.84, the total charges paid by plaintiff to Ebasco in 1954 were incurred in the following months:

March	$9,973.07
April	13,408.00
May	2,773.04
June	2,713.40
July	27,113.96
August	24,793.44
September	38,178.16
October	34,141.45
November	32,013.43
December	23,742.68

226. The services performed by Ebasco during the period from March through June 1954 consisted largely of preliminary engineering and the making of estimates for the facilities to be constructed under the Power Contract. As previously stated in finding 95, Ebasco furnished the basic estimates which were correlated by the engineers of the sponsors for the preparation of the proposal of April 10,

1954. The cost of such services is included in Ebasco's 1954 bill which was paid by plaintiff. Much of the information furnished by Ebasco for the preparation of the proposal was data of the kind that was ultimately needed for the construction of the contract facilities. Ebasco's records were not kept in such a way as to differentiate between its charges for services in preparing the data for the April 10 proposal and for similar information required in construction planning, but it is reasonable to conclude that Ebasco's charges for the month of March 1954 in the sum of $9,973.07 were primarily for service rendered in assisting the sponsors to prepare the proposal of April 10. 1954.

Prior to July 1, 1954, Ebasco's engineers traveled to Washington, D. C., for the purpose of providing information to representatives of the defendant and to the sponsors for a better understanding of the proposal of April 10, 1954. While an accurate determination of the cost of such services cannot be made from Ebasco's records, a fair and reasonable approximation thereof is the sum of $7,000.

227. After July 2, 1954, Ebasco's work on the engineering, design, and construction planning of the contract facilities proceeded at an accelerated rate, because of the target date for the completion of the first generating unit of the power plant. Much of this work was completed before the Power Contract was executed and included the conceptual design of the plant, surveys and subsurface exploration at the site, studies and consultations regarding the specifications for the major items of equipment, planning for subcontract work and for construction housing, discussions with Government and State engineers on the location of the plant, and other construction planning. The evidence shows that most of the services performed and expenses incurred by Ebasco from July 2 to November 10, 1954, related to the construction of the power plant and other facilities. However, the following services do not fall in that category:

(1) The charge of $7,713.84 (referred to in finding 223), covered the preparation by Ebasco of statements of anticipated operating results, cash flow statements, and other data for the consideration of the institutions which were to provide MVG's debt financing. In order to finance the construction and to avoid delays, it was necessary to antici-

pate the cash requirements and to make adequate provision for the same. The services of competent engineers were required for these purposes, and the evidence establishes that Ebasco's charge of $7,713.84 was a fair and reasonable amount for the work.

(2) During the negotiation of the Power Contract from July 1 through November 10, 1954, Seal of Ebasco participated in most of the negotiating sessions. His services were paid for by the sponsors and are not included in any claim in this action. In addition, Ebasco's engineers spent some time and travel in furnishing information needed by the negotiators, but the extent of Ebasco's charges for such work cannot be ascertained from the record.

(3) In December 1954, Ebasco's engineers rendered some services in preparing for and in testifying at the SEC equity proceedings. Here again, the charge for such services cannot be ascertained from the records.

228. Ebasco's charges for 1954 were incurred in the following periods and (exclusive of the audit adjustment of $16.78) in the following amounts:

March to June	$28,862.51
July to November 10	137,716.76
November 11 to December 31	49,963.42
Total	216,542.69

(b) Ebasco, as Agent for MVG

229. Plaintiff's cost in this category amounted to $183,-861.29, and the parties have agreed that this amount correctly reflects the entries appearing on plaintiff's books. The amount claimed represents out-of-pocket expenses which were incurred during the periods and in the amounts as follows:

March 1 to November 10, 1954	$54,847.01
November 11 to December 31, 1954	8,804.79
January to July 1955, inclusive	112,457.64
Subsequent to July 1955	7,751.85

Expenditures prior to November 11, 1954, represent field engineering work on land acquired under option in March 1954. The work consisted of field surveys, the drilling of test holes, soil testing, the grading of an access road, and other preparatory work which was necessary for the con-

struction of the power plant and appurtenances. The defendant contends that it is not liable for the portion of such expenses that were incurred prior to November 11, 1954, the date the Power Contract was executed, and also claims two offsets.

For the first of these offsets, it is defendant's position that the highest and best use of the land acquired for the site of the plant is for industrial purposes and that the cost of the following described work, performed partly in 1954 and partly in 1955, is of permanent value to plaintiff:

Field surveys—C. H. Bond Engineering Co	$10,000.28
Equipment rental for surveys	1,456.25
Water testing service	202.48
Automobile rental	199.77
Maps and engineering data	39.42
Test drilling for location survey—Ebasco	3,367.13
Borings—Eustis Engineering Co	44,015.08
Borings—Eustic Engineering Co	$2,577.00
Soil testing—Barrow Agee Laboratories	7,253.00
Soil testing—Barrow Agee Laboratories	1,851.66
Test piles—Consolidated Contractors	19,951.31
Foundation consultant—Arthur Casagrande	445.00
Total	91,358.38

Aside from the work done by plaintiff, the land has never been used for industrial purposes and is now operated as a farm. The area in which the work was performed was damaged for farming purposes, because the steel pipes that formed the test piles protrude from the ground and interfere with the plowing.

The total tract comprises about 600 acres and was first considered for purchase by the Mississippi Power & Light Company. The tract as a whole will fit into the long-time plans of Middle South. The value, if any, added to the land by the expenditures described above depends upon whether the land will be used for industrial purposes and particularly upon whether any plant erected thereon will be sufficiently similar to the MVG plant in type, size, and location that the data obtained can be used to decrease the costs of planning and construction. Such value, if any, is not presently determinable.

The second offset asserted against the claim in category (b) relates to the sale of certain capital assets. During

1955, Ebasco, as agent for plaintiff, acquired a number of capital assets for the construction work. The assets consisted of automobiles, prefabricated buildings, building supplies and equipment, and office supplies. The property was acquired at a total cost of $60,820.85 and was sold, largely during May and June of 1956 for a total of $35,642.06. The expenses of maintaining and disposing of the property amounted to $3,707.64, and the net amount realized was $31,934.42. The defendant asserts that if the property had been sold in 1955, it would have brought higher prices and that the cost of maintenance and sale would have been considerably reduced. In the post-termination discussions between plaintiff and AEC in July or August 1955, the AEC representatives directed plaintiff not to dispose of the above-described property, stating that it could be taken into the AEC stores in the event the parties were able to agree upon some basis of settlement. Plaintiff was not able to obtain specific directions from AEC about the disposition of the assets and the settlement discussions ended in October 1955. On November 23, 1955, plaintiff was advised that the defendant would not recognize any obligations of the contract. The evidence shows that that amount realized from the sales, as well as the expenses incurred in connection therewith, is fair and reasonable.

No other questions have been raised regarding the amount claimed in the category of "Ebasco as Agent for MVG."

(c) MVG Charges

230. Plaintiff's claim under this heading amounts to $218,254.09 for expenses incurred during 1955, and the first classification under which these charges are grouped covers the following partial payments and payments on account:

J. A. Jones Construction Company	$100,025
Pandick Press	5,000
Arthur Andersen & Co.	1,300
Winthrop, Stimson, Putnam & Roberts	4,000
Ebasco	16,000
Cahill, Gordon, Reindel & Ohl	11,000
Assignee of Jackson Life Insurance Company	10,000
Total	147,325

It is conceded that the $100,000 paid to J. A. Jones Construction Company was a fair and reasonable payment, but defendant urges that the remaining $25 paid to that company was not a reasonable or necessary expense. After the termination of the Power Contract, one of Jones' subcontractors threatened to bring suit. In order to forestall this action and to allow time for further discussions with AEC, plaintiff and Jones entered into a written agreement, providing that neither Jones nor any of its subcontractors would sue plaintiff pending a final determination of its claim against defendant. The twenty-five dollars was paid as a consideration for the agreement.

On May 27, 1955, plaintiff entered into a contract with Jackson Life Insurance Company, one of the use-plaintiffs, for the purchase from the latter of "200,000 yards of sand, and as much sand in addition thereto, not to exceed 500,000 yards for the price of $0.10 per yard." Prior to the termination of the Power Contract, 19,978 yards of sand had been removed. Jackson Life Insurance Company insisted that it be paid for 200,000 yards of sand, and plaintiff's counsel advised that the insurance company's contention was valid. Thereafter, the assignee of Jackson Life Insurance Company filed suit against plaintiff to recover the sum of $18,002.20 representing the value of the 200,000 yards of sand, less the amount previously paid for the sand already removed. Plaintiff settled the suit by an agreement of March 29, 1956, whereby plaintiff paid the assignee a cash consideration of $10,000, and plaintiff received a deed granting to it and its assigns the right, without further payment, to remove 100,000 yards of sand, dirt or soil from the site at any time prior to March 26. 1966. Plaintiff has no need for the sand or other material, and there is no demand for it at the present time. However, considering the period of time allowed for the removal of material and the prospect of plaintiff's use or sale of some portion thereof, the fair and reasonable value of plaintiff's sand deed is the sum of $2,500.

With respect to the remaining items set forth in the table above (totaling $147,325), the parties have agreed that if judgments are rendered in behalf of such claimants and the

judgments are reduced by the amount of the payments previously made by plaintiff, it is entitled to credit therefor.

The second group of claims in this category consists of the following:

Organization expense	$1, 836. 33
Capital stock expense	945. 55
Unamortized debt discount and expense	33, 020. 00
Miscellaneous general administration expense	35, 127.21
Total	70, 929. 09

Plaintiff's organization expense consists of $1,201 spent for United States documentary tax stamps on 11,000 shares of its capital stock and the sum of $626.33 expended in connection with its organization as a corporation under the laws of Arkansas. Under the uniform system of accounts of the Federal Power Commission, these items are properly chargeable to organization expense, but the defendant contends that they do not constitute proper items of damage in this action.

The item of $945.55, also disputed by the defendant, represents plaintiff's share of the cost of printing a brief and other documents filed by plaintiff in the Court of Appeals on the appeal from the SEC order in the equity proceedings.

In order to obtain the approval of the Arkansas Public Service Commission for the approval of plaintiff's bond issue and bank loans, plaintiff paid the State a fee of $33,000, plus $20 for certified copies required by the financial institutions which provided plaintiff's debt financing. Plaintiff's efforts to obtain a refund of the fee after the cancellation of the Power Contract were unsuccessful. Defendant denies that this expense is a proper item of damage.

Liability for the payment of the claim for general administrative expense in the amount of $35,127.20 is disputed to the extent of $27,500. This amount represents interest at the rate of six percent per annum that was charged to construction on the $1,100,000 paid to plaintiff by the sponsors for its capital stock The claim is for the period from February 11, 1955, when the stock was sold, until July 11, 1955, when the Power Contract was terminated. Section 4.02 of the Power Contract states that the elements of cost included in the term "construction" shall be determined in

accordance with the uniform system of accounts of the Federal Power Commission and that system provides for an interest charge on equity capital during the period of construction. Section 4.02 of the intrepretative memorandum provides in part:

> In computing the Interest during Construction component of the cost of the Facilities the rate of return on equity capital is not to exceed 6%.

O. *The Claim of Ebasco Services, Inc.*

231. Ebasco's claim is for its services and expenses for the year 1955, its charges for the year 1954 having been paid by plaintiff and included in plaintiff's claim as shown in preceding findings. The original claim was in the amount of $589,430.76, but it has been reduced to $570,727.59, as a result of a payment of $16,000 on account by plaintiff (now included in plaintiff's claim), by various credits, audit adjustments, and a waiver. The original claim included the sum of $546,328.14 for services and expenses during the period from January through July 1955, and $43,102.62 for services and expenses from August through November 1955 in connection with activities following the termination of the Power Contract. With allowances for the adjustments and credits above referred to, there is no question regarding the accuracy of the claim. The following findings relate to those portions of the claim which are disputed by defendant.

(1) Ebasco's claim for the period from January through July 1955 is based upon its written contract with plaintiff, which became effective April 20, 1955. Prior to the execution of the contract, plaintiff submitted the contract to AEC and received its approval of Ebasco as architect-engineer on the project. The contract provided that Ebasco was to be reimbursed for its costs, except for certain costs which were to be absorbed by it, and also provided that Ebasco would receive a fixed fee of $1,800,000 to be paid as follows: 18 monthly installments of $60,000, beginning with the first full month of the contract period, 16 monthly installments of $30,000 thereafter, and the balance of the fee to be considered as retentions payable upon completion of the

work. In the event the contract was terminated by MVG, Ebasco was to be paid its costs and the fee earned up to and including the month in which the termination occurred "plus the proportional part of all retentions." Ebasco's claim includes a fee in the amount of $180,000, which defendant contends is excessive and unreasonable.

Under the terms of its contract with plaintiff, Ebasco is due a fee of $180,000 for its services during May, June, and July 1955. The portion of Ebasco's fee that was retained was $160,000, which is 8.89 percent of the total fee payable, or 9.75 percent of the aggregate of the monthly payments. The proportional part of the retention that is applicable to the $180,000 of accrued monthly payments is 9.75 percent or $17,560. However, Ebasco has made no claim for the proportional part of the retentions. Ebasco absorbed $106,162.12 of the costs it incurred under its contract with plaintiff. It also expended $2,200 in preparing material which plaintiff submitted to AEC in justification of the employment of Ebasco. Since the fee payments did not begin under the contract at the time Ebasco started working for MVG, the accumulated payments were lower in proportion to the total fee than the percentage of services rendered at that time by Ebasco to the total services required. The record as a whole establishes that the fee claimed by Ebasco is fair and reasonable.

(2) After the termination of the Power Contract, an AEC staff auditor tabulated certain salary payments which the defendant claims Ebasco was obligated to absorb under the terms of the MVG-Ebasco contract. The payments include the sum of $3,239.15 which the auditor listed under the heading of "Construction Management", $115.28 listed under the heading of "Insurance Department", and $3,661.42 listed under the heading of "Washington Office."

Sections V (h) and (k) of the MVG-Ebasco contract required Ebasco to absorb the costs of the services of its New York office construction staff and the services of a construction manager, who was to organize the field office staff and exercise general supervision over the project. The evidence does not show that Ebasco was not required by its contract to absorb the $3,239.15 paid for such services.

Under its contract, Ebasco was required to absorb the services of its New York insurance personnel in connection with all insurance coverages relating to the work, but the evidence shows that the $115.28 was compensation paid to design engineers for time spent in consulting with insurance engineers for recommendation as to the location of equipment for the purpose of avoiding fire hazards. The amount was not paid to insurance engineers for handling insurance coverages.

The item of $3,661.42 represents salaries paid to Ebasco's employees in Washington, D. C. It was deducted from Ebasco's claim by the AEC auditor on the basis of a statement made to him by an Ebasco official to the effect that part of the amount was for clerical and staff assistance rendered to the sponsors during the preparation of the April 10, 1954, proposal and that the remainder was paid to Ebasco employees during May, June, and July 1955, when they were engaged in obtaining priorities and permits from various Government agencies in connection with the construction of the plant.

The auditor made no segregation of the payments between the two types of services, but we have concluded that approximately $2,161 consists of Ebasco's charge for services rendered in connection with the preparation of the April 10 proposal and is included in the expenditures for this purpose as shown in finding 226. As to the remaining $1,500.42, which was charged for services rendered in obtaining priorities and permits from various Government agencies in connection with the construction of the plant, plaintiff has failed to establish that the cost of these charges was not to be absorbed under the terms of the contract between plaintiff and Ebasco.

(3) The defendant's AEC auditor prepared a statement of Ebasco's overhead charges for the months of May and June 1955, including $32,098.44 for May and $32,644.79 for June. These sums amounted to about 10 percent of Ebasco's overhead on all work during these months, and the defendant contends that such charges are not related to Ebasco's contract and that their elimination would reduce the claim by $16,600. Ebasco's direct and indirect costs are determined

in accordance with an accounting system submitted to and approved by the SEC. The overhead is accumulated under six general categories, and through an elaborate system of calculations, monthly rates are arrived at and apportioned to direct labor costs. The evidence shows that there is no improper allocation of overhead in Ebasco's claim with the exception of the three following accounts:

	1955 May	1955 June
Excess of termin. reserve accrual over actual	$1,872.08	$2,622.00
Accrual for additional legal services	2,000.00	2,000.00
Accrual of machine accounting installation costs	1,250.00	1,550.00

Plaintiff has not proved whether these items represent true liabilities or are mere estimates. Accordingly, it is reasonable to exclude them from the overhead base used in making allocations to MVG work and such exclusion results in a reduction of approximately $960 in Ebasco's claim.

(4) Included in Ebasco's claim for the period prior to July 31, 1955, is the sum of $281.70, which represents compensation paid to Ebasco's engineers for planning the facilities and space that would be required for the accounting organization of plaintiff in the operation of the generating plant at West Memphis. Although a separate work order was issued for such work under date of May 23, 1955, the work order was for the type of engineering work required by the MVG-Ebasco contract, and the order stated that Ebasco was to be reimbursed for the costs pursuant to Section VIII of that contract.

Also included in Ebasco's claim for the period before July 31, 1955, is the sum of $8,476.67 for services paid to Ebasco's personnel for the preparation of data required by the institutional investors in connection with the bond purchase and bank credit agreements, as well as for the draft of the mortgage. The data included a preliminary estimate of the results of operating the plant and other details. The record shows that the life insurance companies which purchased plaintiff's bonds relied in part on Ebasco's report in making the commitment to buy the bonds. The services rendered were not specifically provided for in the MVG-Ebasco contract but were performed under a work order dated May 23, 1955, stating that the costs were to be re-

imbursed pursuant to section VIII of the MVG-Ebasco contract.

Defendant contends that neither of the above items is a proper item of damage.

(5) For its services during the period from August through November 1955, Ebasco did not charge on the basis provided for in its contract with plaintiff. Ebasco considered that the contract was terminated because of the termination of the Power Contract. Therefore, Ebasco billed plaintiff for the services of designers and draftsmen at twice their rate of compensation and for the services of engineers and other technical personnel at 2½ times their rate of compensation, plus social security taxes. These were the customary per diem rates charged by Ebasco. The total charge includes $35,666.31 for personal services and $7,393.74 for out-of-pocket expenses. Defendant contends that since the MVG-Ebasco contract provided that Ebasco's overhead would be limited to a charge of 65 percent of total salary compensation, the above claim should not exceed the sum of $35,120.65. However, had Ebasco rendered bills to plaintiff in accordance with the terms of its contract after July 31, 1955, Ebasco would have been entitled to receive the monthly installments of its fee, plus a proportion of the retained fee, plus its expenses and overhead, less the costs it was required to absorb under the language of the contract. The evidence shows that the amount claimed is fair and reasonable.

(6) Ebasco's claim includes a relatively small amount for the services of its engineers in preparing for and testifying at the hearings held before the SEC and the Arkansas Public Service Commission in 1955 in connection with plaintiff's applications to those agencies. The records in evidence do not establish the amount charged for such purposes in 1955.

(7) When plaintiff notified Ebasco on July 1, 1955, to terminate work on the project, Ebasco did so as expeditiously as possible. However, in view of AEC's failure to give plaintiff instructions on post-termination activities and the possibility that Ebasco might be required to continue with the work, it completed the partially finished design

drawings of the plant. Ebasco has retained the original tracings, one copy of each drawing, copies of engineering studies on the project, and copies of various specifications it prepared. The defendant contends that these records are of value to Ebasco and that the claim should be reduced by an amount equal to 10 percent of the cost of Ebasco's preliminary and design engineering from July 1, 1954, through July 1, 1955. The evidence does not establish that the drawings, studies, or specifications would be used by Ebasco on any other jobs, that they would be used for reference purposes, or that they have any value to Ebasco.

P. *The Claims of Cahill-Gordon, Winthrop-Stimson, Willkie-Owen, and Milbank-Tweed*

232. The petition includes claims in behalf of four other New York City law firms. They are Cahill, Gordon, Reindel & Ohl (hereinafter called Cahill-Gordon), Winthrop, Stimson, Putnam & Roberts (hereinafter called Winthrop-Stimson), Wilkie, Owen, Farr, Gallagher & Walton (hereinafter called Willkie-Owen), and Milbank, Tweed, Hope & Hadley (hereinafter called Milbank-Tweed).

Since Cahill-Gordon and Winthrop-Stimson both represented plaintiff and since other pertinent facts are applicable to the claims of each of the four firms, the claims will be considered together.

(a) The Claim of Cahill, Gordon, Reindel & Ohl

233. The claim of this law firm is in the amount of $246,-198.76. It covers a period from February 22, 1954 through November 29, 1955. Of the amount claimed, $235,000 is for services rendered, and $11,198.76 is for out-of-pocket disbursements in connection with such services. Plaintiff has paid $11,000 of such disbursements, leaving a net claim of $235,198.76.

234. Cahill-Gordon is and has been general counsel for Middle South and for MVG since it was incorporated on July 19, 1954. Before that date and commencing on February 22, 1954, the firm rendered services and gave advice in connection with various matters for the account and

benefit of the proposed new corporation that was later organized as MVG.

The services of the firm were rendered in close cooperation with Winthrop-Stimson, general counsel for Southern. The services of Cahill-Gordon are fully described in plaintiff's exhibit 109 and defendant's exhibit 259. The following is a summary of the principal services performed by the firm during the four periods mentioned below:

(1) *February 22 through April 10, 1954*

Beginning on February 22, 1954, the firm assisted in drafting the sponsors' proposal of February 25, 1954, and considered various legal problems that the project would create with respect to Middle South and Southern, and the relationships among the companies in their systems and with MVG. The first proposal was prepared and submitted under great pressure, because of the insistence of the Budget Bureau on the need for speed. Cahill-Gordon participated in the review of the first proposal, and assisted in the drafting of the proposal of April 10, 1954. In the period between the two proposals, the attorneys conferred with representatives of the sponsors and the companies in their systems in an effort to work out appropriate intercompany relationships.

The hours of work spent by Cahill-Gordon on the above-described matters during the first period amount to 155.

(2) *April 11 through June 24, 1954*

In the three months' interval after the filing of the April 10 proposal, Cahill-Gordon worked on and gave attention to proposed amendments to the Atomic Energy Act, to preliminary matters relating to the organization and incorporation of MVG, and to the various Federal and State regulatory proceedings that would have to be conducted in the event a contract was entered into with the Government. The firm also reviewed AEC's contracts with EEI and OVEC, and thereafter prepared the first draft of the proposed power contract, proofs of which were distributed to the sponsors. These activities required 152 hours of work by claimant during the interim period.

(3) *July 3 through November 11, 1954*

The proof of the Power Contract prepared by Cahill-Gordon formed the basis for the first negotiation session held with AEC on July 7, 1954. Thereafter, the Cahill-Gordon partner in charge of the work on the project attended 17 sessions at the AEC office in Washington, D. C., and presided over the MVG group during the meetings with AEC. The negotiations were arduous because of the complexity of the subject matter, the various changes proposed by the defendant from time to time, amendments to the Atomic Energy Act during the same period, the great public interest in the project, and the criticism and attacks directed against it. The partner in charge had to do this work away from his home office. The daily sessions often lasted for 10 hours or more, and the attorney worked many nights and on Sundays.

While the contract was being negotiated, an attorney from the firm attended sessions of the Joint Committee on Atomic Energy and helped MVG officers prepare for public hearings, although they were not called to testify.

Cahill-Gordon also participated in the revision of the draft of the interim power agreement, prepared by Winthrop-Stimson. This work culminated in the letter agreement of November 11, 1954.

During the same period, Cahill-Gordon began work in New York on the stock financing documents and prepared a draft of an application to SEC, requesting authority for the issuance and sale of plaintiff's stock. As previously stated, the application was filed in SEC on November 17, 1954.

As early as May 1954, Cahill-Gordon conferred with plaintiff and its financial agents regarding plaintiff's debt financing and studied the memorandum outlining the basic terms of the proposed financing. In August and September, Cahill-Gordon prepared the first drafts of the bond purchase agreement, including the mortgage, and the bank credit agreement. The bond purchase agreement, when completed, was a document of 15 printed pages with an attached intercompany agreement of 7 pages, and a mortgage of 187 printed pages. The bank credit agreement contained 16

printed pages and had attached thereto various documents, including a form of note and a form of an opinion to be given by the counsel for the banks. Although Cahill-Gordon was assisted in this work by the opinions and suggestions of other counsel, the firm retained primary responsibility for the drafting of the financing documents and for clearing changes and additions thereto.

The firm also devoted some time to the preparation and revision of the articles of incorporation and bylaws of MVG.

During the period stated, the firm's records show that it spent 1095.50 hours on the various matters outlined above.

(4) *November 11, 1954 through July 10, 1955*

During this period, the firm devoted a total of 3,486.25 hours to a variety of matters, including MVG's stock financing, purchase of MVG stock by Middle South, bond financing, bank financing, and regulatory approvals related to these matters.

The application relating to MVG's stock was vigorously contested in the SEC by the State of Tennessee and the Light, Gas and Water Division of the City of Memphis. Cahill-Gordon, with Winthrop-Stimson, prepared an answer to the motion of the State of Tennessee, *et al.*, to intervene in the proceedings, participated as counsel in the SEC hearings, and filed proposed findings of fact and a reply brief. The Cahill-Gordon partner presented oral argument on behalf of MVG and Middle South. After the SEC order was appealed to the United States Court of Appeals for the District of Columbia, the two firms filed a petition to intervene on behalf of Middle South and Southern, a motion to dismiss the petition for review, an answer, a brief and reply brief. They also argued the question on the merits and, after the case was remanded to SEC because of the termination of the Power Contract, the two firms filed in the SEC an amendment to the application, calling attention to the termination of the Power Contract.

During this same period, the firm completed the drafting and negotiation of the various documents required in connection with MVG's bond and bank financing. The work

was difficult and time-consuming because of the complexity of the documents and the fact that the positions of the secured and unsecured creditors were more opposed than in the usual situation. As already stated, both sets of lending documents were signed in April 1955. Negotiation was delayed and rendered more difficult because of the recapture provision in section 7.09 of the Power Contract, which was not agreed upon until near the end of the negotiations between AEC and MVG. The firm was called upon to prepare and submit to the lenders legal opinions as to the validity of the bond purchase and bank credit agreements, the Power Contract, and the intercompany agreement.

Cahill-Gordon also drafted the back-up and surplus power agreement required by section 2.02 of the contract and had it in final form at the time the contract was cancelled by the defendant.

In connection with the approvals required to be obtained from the Arkansas Public Service Commission, Cahill-Gordon cleared with local attorneys as to the content of the documents filed in Arkansas and had a senior associate present at the hearings in that State.

Cahill-Gordon, with the assistance of Winthrop-Stimson, prepared the application filed in SEC for authorization of plaintiff's debt financing and participated in the SEC hearings in which MVG was opposed by the same parties who intervened in the equity proceedings. The two law firms filed a brief, proposed findings of fact and conclusions, but before any action was taken by SEC, the Power Contract was terminated.

Other activities in which representatives of the firm were engaged during this period consisted of advice given to plaintiff regarding the retention of Ebasco as architect-engineer, the filing of applications with the Federal Power Commission on behalf of officers of MVG and Middle South, and legal services related to the laying of the transmission lines of the MVG plant across the Mississippi River.

(5) *July 12, 1955 through November 29, 1955*

After the defendant gave notice that the contract would be terminated, the firm assisted MVG with the grave legal

and practical problems arising out of its commitments and obligations for the projected power plant. Cahill-Gordon gave advice and assistance regarding arrangements for terminating the various purchase orders and subcontracts at the least possible cost, attended conferences with AEC in an effort to agree upon cancellation costs, rendering an opinion upon the conflict of interest question raised by the AEC, and counseled MVG on how to mitigate the damages sustained by various claimants.

Cahill-Gordon, with the assistance of Winthrop-Stimson, also prepared and filed the petition in this court. Of the total of 623.25 hours of service recorded by Cahill-Gordon during this period, approximately 63½ hours were devoted to the preparation of the plaintiff's petition in this case and to other work directly related thereto.

The records of Cahill-Gordon show recorded time of 5,512 hours in performing the services covered by its claim. Approximately 40 percent of this total were hours spent by partners and 60 percent were hours spent by associates, principally senior associates. Although the services were not charged for on an hourly basis, Cahill-Gordon's average hourly charge amounted to $42.63.

Under a tentative arrangement made for bookkeeping purposes, the hours devoted to services rendered were charged to five separate accounts. The distribution of such hours among the several accounts throughout the five periods referred to above is shown in the following table:

536830—60——17

Accounts	Hours of services by periods					
	Feb. 22 through Apr. 10, 1954	Apr. 11 through June 24, 1954	July 3 through Nov. 11, 1954	Nov. 11, 1954, through July 10, 1955	July 12 through Nov. 29, 1955	Total
MVG General	155	116.25	882.00	448.25	617.50	2,219.00
Bond financing		35.75	166.25	822.50	2.50	1,027.00
Common stock financing			7.25	1,069.00	.50	1,076.75
Middle South stock financing				678.00	.25	678.25
Bank financing			40.00	468.50	2.50	1.00
Total	155	152.00	1,095.50	3,[illegible]86.25	623.25	5,512.00

While an exact computation cannot be made, a reasonably correct determination shows that the amount claimed in behalf of Cahill-Gordon includes $2,707.01 for preparing the petition in this case.

235. Sometime prior to the execution of the Power Contract, there was a tentative understanding among plaintiff, the sponsors, Cahill-Gordon, and Winthrop-Stimson that a portion of the charges for the services of the two law firms would be paid for by the sponsors on the theory that they would have an investment in MVG and that the investment would be of value to them. The result of this temporary arrangement would have been to allocate approximately 24 percent of Cahill-Gordon's charges to Middle South, and 40 percent of Winthrop-Stimson's charges to Southern. The understanding was reached at a time when there was no thought that defendant would terminate the Power Contract. After the sponsors' investment had been converted from an apparent asset to a liability by the cancellation of that contract, the temporary arrangement was abandoned and the total charges claimed by the two firms in this action were charged to plaintiff on the premise that all of such legal services had been rendered in aid of enabling MVG to obtain and carry out the Power Contract and, therefore, that the expenses should be borne by plaintiff. The sponsors also considered that this action was proper because of their opinion that the provisions of section 7.07 of the Power Contract contemplated that they would be made whole if the contract was cancelled.

(b) *The Claim of Winthrop, Stimson, Putnam & Roberts*

236. The claim of this law firm is for $108,128.67. It covers the period from February 5, 1954 through November 29, 1955, in which there were 2,785.43 hours of service charged on the firm's books. Of the amount claimed, $104,000 is for service rendered, and $4,128.67 is for out-of-pocket expenses. Plaintiff has paid $4,000 of these expenses, thereby reducing the net claim of the firm to the sum of $104,128.67. Winthrop-Stimson has been counsel for Southern for many years and joined with Cahill-Gordon in representing plaintiff.

A complete statement of the nature of the services rendered by Winthrop-Stimson during the time pertinent to the claim appears in plaintiff's exhibit 110 and defendant's exhibit 260. As stated, Winthrop-Stimson participated with Cahill-Gordon in rendering the services described in finding 234 (1–5). Therefore, except as otherwise indicated by the context, the facts set forth in finding 234 (1–5) and finding 235 are applicable to the claim of Winthrop-Stimson. In addition, Winthrop-Stimson prepared the initial draft of the intercompany agreement, prepared and furnished to AEC an opinion showing that Southern and its subsidiaries were authorized to engage in the undertakings required by the Power Contract, performed extensive research regarding the effect of the Public Utility Holding Act of 1935 on the arrangements contemplated by the Power Contract, and dealt exhaustively with one of the legal problems presented in the SEC proceedings, namely, a showing that MVG's plant was capable of economical and efficient operation as a part of Southern's integrated system within the standards of the Public Utility Holding Act. Although Cahill-Gordon prepared the first drafts of many of the documents described in finding 234, Winthrop-Stimson not only reviewed the drafts but did research on the legal questions involved, submitted memoranda pertaining thereto, and prepared appropriate revisions to be incorporated in the final drafts of such documents.

237. The records of Winthrop-Stimson show recorded time of 2,785.43 hours for the period covered by its claim. Of the total hours of service, 1,503.59 hours were spent by partners and 1,281.84 were spent by associates. The average charge per hour was $37.82.

The following table shows the six classifications to which the services were charged during the periods stated:

Classifications	Hours of services by periods				
	Feb. 5 to June 30, 1954	July 2 to Nov. 10, 1954	Nov. 11, 1954, to July 11, 1955	July 12 to Nov. 29, 1955	Total hours
Southern Co., general Re: MVG	203.25	453.75	16.00		675.00
SEC hearings		167.25	824.75		992.00
Appeal from SEC order			382.18	8.75	390.93
Debt financing			366.00		366.00
Power contract			14.00		14.00
Termination of power contract				347.50	347.50
Total hours by periods	203.25	621.00	1,604.93	356.25	2,785.43

During the first period covered by the foregoing table, Winthrop-Stimson spent 15 hours in the preparation of a proposal, which was submitted by Southern to TVA on February 9, 1954.

In November 1955, the firm devoted approximately 7 hours in assisting Cahill-Gordon in the preparation of the petition filed in this suit.

238. There was some duplication in the services rendered by Cahill-Gordon and by Winthrop-Stimson during the period covered by the claims of the two firms. Since the proposed power plant involved relationships among MVG, Southern, and the subsidiaries of the Southern system, Southern requested that its counsel, Winthrop-Stimson, participate with Cahill-Gordon in the joint enterprise of the sponsors. It was defendant's wish that more than one sponsoring company participate in the proposal. In view of the intercompany arrangements contemplated by the Power Contract, the obligations assumed by Southern and its subsidiaries, and the magnitude and complexity of the resulting legal problems, Southern's request was reasonable. Moreover, in view of its acquaintance and relationship with Southern and its subsidiaries, Winthrop-Stimson was in the best position to facilitate the power arrangements between MVG and Southern's subsidiaries.

Although records are not available for exact computations, a reasonably correct determination shows that the amount claimed in behalf of Winthrop-Stimson includes $567.30 for 15 hours spent in preparing a proposal from Southern to TVA, and the sum of $264.74 for 7 hours spent in drafting plaintiff's petition.

(c) *The Claim of Willkie, Owen, Farr, Gallagher & Walton*

239. The claim of this law firm is in the amount of $75,787.85, of which $75,000 is for services rendered, and $787.85 is for disbursements. The firm was retained on or about August 16, 1954, to act as special counsel for the Metropolitan Life Insurance Company and New York Life Insurance Company in connection with their respective commitments to purchase an aggregate principal amount of not to exceed $92,914,000 of plaintiff's first mortgage bonds. By

the terms of section 9.06 of the bond purchase agreement, plaintiff became obligated to pay the reasonable fees and disbursements of Willkie-Owen, whether or not the transactions contemplated in the agreements were consummated.

240. A complete statement of Willkie-Owen's services appears in plaintiff's exhibit 107 and defendant's exhibit 257. The following is a summary of the matters set forth in the exhibits:

Since the Power Contract was to be assigned as security for the payment of bonds, Willkie-Owen studied the memoranda describing plaintiff's proposed debt financing and examined all aspects of the Power Contract, including the provisions of the Atomic Energy Act of 1954 and the action to be taken by certain governmental agencies pursuant to the terms of the Power Contract. This was done in August 1954 in order to advise the insurance companies of the basic problems involved in the financing. During September, October, and early November, Willkie-Owen examined and revised the drafts of the proposed bond purchase agreements, the subscription agreements, the intercompany agreement, and the mortgage and deed of trust. The firm's progress on these matters was directly affected by the negotiation of the Power Contract and particularly by the inclusion in the final draft of that contract of a provision giving the Government the right to recapture the power plant and other facilities. This development was of particular concern to the bond purchasers and much time was required in working out a solution that was satisfactory.

In the interest of the bond purchasers, Willkie-Owen studied the reported proceedings of the Joint Committee on Atomic Energy and the subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.

In December 1954, the firm prepared for the bond purchasers a list of 34 substantive matters disclosed by a review of the financing documents and the Power Contract. After extended discussion, agreement was achieved between plaintiff and the bond purchasers on these and additional matters.

Willkie-Owen gave attention to the SEC hearings, particularly to the position taken by the State of Tennessee and others regarding the validity of the Power Contract.

During January and February 1955, Willkie-Owen attended conferences between plaintiff and the bond purchasers, as a result of which a business understanding was reached. Thereafter, the firm began a detailed step-by-step revision of the bond purchase agreements, the intercompany agreement, and the mortgage. From February 15 to March 24, 1955, the law firm worked under continuous pressure in order to get the financing documents in final form as soon as possible and thus enable plaintiff to file its application for SEC approval of the debt financing.

From February 1, 1955, until the bond purchase agreements were signed on April 21, 1955, Willkie-Owen devoted a substantial amount of time in determining whether and to what extent the interests of the bond purchasers were affected by the resolution of rescission of the Joint Committee on Atomic Energy, by a letter from the Chairman of the Joint Committee to the effect that the bonds were not legal investments, and by the appeal from the SEC equity proceedings.

Willkie-Owen reviewed plaintiff's application for SEC approval of the debt financing and advised the officials of the insurance companies regarding the testimony to be given by them in that proceeding. Late in June 1955, the firm rendered a formal opinion on new legal questions raised by one of the bond purchasers.

After June 1955, the firm's services were largely devoted to reviewing the SEC proceedings relating to plaintiff's debt financing and to the consideration of questions raised by the cancellation of the Power Contract. At the time of borrowing under the bank credit agreement and at the first closing of the bond purchase agreement, Willkie-Owen would have been required to render opinions covering almost every phase of the transaction in which the bond purchasers were interested. Since the Power Contract was cancelled, Willkie-Owen was never in fact called upon to submit these opinions, but the form and substance had to be agreed upon and the exact language had to be prepared and attached to the bond purchase agreements. Therefore, the firm had to make a complete examination of the legal questions involved before the execution of the bond purchase agreements in order to determine whether or not the

firm could give the opinions required by the bond purchasers.

In performing the legal services described, a total of 1,792¾ hours were spent by Willkie-Owen, of which 837¾ hours were spent by partners, and 955 hours were spent by associates. The records of the firm show that the time was spent as follows: 335 hours between August 16 and November 11, 1954, when the Power Contract was signed; 1,185¾ hours from November 11, 1954 to April 21, 1955, when the bond purchase agreements were signed; 252½ hours between that date and July 11, 1955, when the Power Contract was cancelled, and 19½ hours thereafter. Of the total time spent, 1,753¾ hours were devoted to the bond purchase agreements, 29 hours to the SEC hearings, and 10 hours to other matters. The average hourly charge for Willkie-Owen's services was $41.84.

(d) *The Claim of Milbank, Tweed, Hope & Hadley*

241. The claim of this law firm is in the amount of $15,000 for services rendered over a period of 15 months, from August 10, 1954 to December 5, 1955. The firm was retained as special counsel for The Chase Manhattan Bank and 23 other participating banks in connection with the commitments of the banks to lend plaintiff up to $27,086,000, pursuant to a bank credit agreement dated and executed April 21, 1955. Under section 9.04 of the agreement, plaintiff became obligated to pay the reasonable fees and disbursements of Milbank-Tweed whether or not the transactions contemplated were consummated.

242. A complete description of the services rendered by Milbank-Tweed is contained in plaintiff's exhibit 108 and defendant's exhibit 258. The principal services rendered were:

(1) Participation in the drafting and negotiation of the bank credit agreement and the related intercompany agreement, including attendance at the numerous conferences incident thereto.

(2) Study and analysis of the Power Contract and related documents, e bond purchase agreement, and the mort-

gage securing the bonds, and advice to the banks concerning the validity and enforceability of these documents.

(3) The drafting of instruments evidencing the corporate proceedings required to authorize the bank loans, and the preparation of an opinion to be furnished by the firm pursuant to the bank credit agreement.

(4) Consultation with plaintiff regarding the proceedings before SEC and the Arkansas Public Service Commission.

(5) Advice to the banks concerning the legal questions raised by the cancellation of the Power Contract and the rescission by SEC of the order authorizing the issuance and sale of plaintiff's stock.

(6) The negotiation and drafting of an agreement terminating the banks' commitments to plaintiff.

In performing these services, a total of 465½ hours were spent by the firm, of which 70 were spent by a senior partner, 367 by a senior associate, and 28 by other partners and associates. Of this time, 103¾ hours are recorded as having been spent between August 10 and November 11, 1954, the date of signing of the power contract; 248¼ hours between that date and April 21, 1955, the date of the bank credit agreement; 74 hours between that date and July 11, 1955, the date of cancellation of the power contract; and 39½ hours subsequent to that date. All time recorded on the firm's books was charged to one account entitled "Re: MVG Co.". The average charge per hour for the firm's services was $32.19.

(e) *Reasonableness of the Attorneys' Fees*

243. Three eminent members of the New York bar who are senior partners of firms of standing, experience, and size comparable to the four firms asserting claims in this suit were called as witnesses by plaintiff. The three expert witnesses testified that the fee claimed by each of the four firms is fair, reasonable, and in line with fees that would have been charged by comparable firms in New York City for similar work. No testimony to the contrary was adduced by defendant.

244. In addition to the facts which have been set forth in the preceding findings, the following facts are pertinent to

the reasonableness of the fees charged by the four law firms:

(1) While attorney's fees for the type of services rendered are not determined by multiplying the hours spent by some fixed rate, the time devoted to the work and the division of time between partners and associates are factors of importance. The average attorney in one of these firms records about 1,500 chargeable hours a year. The time devoted by each firm to the services rendered was approximately equivalent to the uninterrupted services of one man for the following periods of time:

Firm	*Total period of services*	*Equivalent time for one man*
Cahill-Gordon	21 months	44 months.
Winthrop-Stimson	22½ months	22⅓ months.
Willkie-Owen	17 months	14⅓ months.
Milbank-Tweed	17 months	3¾ months.

At the time the services were performed, the salaries paid to associates in such firms varied from $4,500 per annum for juniors to $20,000 per annum for senior associates: the latter figure includes bonuses. Not less than one-half of the gross receipts of each law firm was required for the payment of overhead, including the salaries of associates.

(2) The total fees charged by the four firms, equated to an hourly basis, averaged less than $40 per hour. At the time the services were rendered, the fees charged represented the "going" rates in New York City for legal services of the kind involved here.

(3) In the transactions in which the attorneys were employed, five major private interests were involved—the plaintiff, the 2 sponsors, 2 insurance companies, and 24 banks. At least four agencies of the Federal Government, two States, and two cities had a definitive interest in the matter. In addition, the work of the attorneys was affected by the activities of several congressional committees.

(4) Approximately 120 million dollars in financial commitments were involved. There is no fixed ratio between the amount of money in a transaction and the fees charged for legal services rendered in connection therewith. Also, the percentage of fees to the amount of the securities generally diminishes as the sum of the securities is increased. However, the amount of money in the transactions with

which the four firms were concerned was a substantial sum and the percentage of their fees to that sum is in line with fees charged by other New York attorneys in similar cases.

(5) The partners from the four firms are lawyers of wide experience and demonstrated ability in their respective fields of specialization; each has a good reputation and a high standing in his profession. The associates who worked with them were competent for the tasks assigned to them. Each of the attorneys displayed a high degree of professional competence.

(6) The services of the attorneys, particularly those of Cahill-Gordon and Winthrop-Stimson, were rendered under considerable strain and pressure. In the beginning, the defendant announced that the power from the proposed plant would be needed by the fall of 1957. The negotiation of the contract was conducted against a moving target in that the bill, which became the Atomic Energy Act of 1954, was under consideration by Congress during a substantial part of the negotiating period. Some of the provisions in and amendments to the bill had a direct bearing upon the kind of contract which could be entered into. The Power Contract was the object of great public interest, and it was necessary for the attorneys to consider almost every provision of the contract in light of the criticism and attacks directed against the project. Near the end of the negotiations, a difficult question from the standpoint of the four law firms was presented by AEC's insistence upon the inclusion of the recapture provision in the Power Contract. The factor of strain and pressure continued to some extent after the execution of the Power Contract because of the vigorous opposition encountered by the attorneys' clients in the SEC equity and debt financing proceedings and the delay which resulted therefrom.

245. In view of the character, scope, and complexity of the work performed by the attorneys, the time they devoted to the work, the legal experience and skill required, the circumstances under which the services were rendered, and the contributions made by the four firms to the solution of the many problems presented to them, the fees charged by them and claimed in this action are fair and reasonable.

Q. *Post-Petition Claims*

246. In paragraphs 19 and 22 of the petition, plaintiff alleged that:

> The plaintiff will also incur additional expenses prior to the satisfaction of the judgment herein, the amount of which will be supplied by amendment hereto.

With respect to post-petition claims, the parties have stipulated that the trial be limited to the issue of plaintiff's right to recover, with the determination of the amount of recovery, if any, reserved for further proceedings. In order to expedite the presentation of this issue to the court, the parties have agreed upon the general nature of such expenses, without prejudice to defendant's right, among others, to contest the actual incurrence of the expenses and performance of the services, if it is held that plaintiff is entitled to recover for them.

The names of post-petition claimants and a statement of the general nature of services performed or expenses incurred by them follow:

(a) *Ebasco* rendered services between December 1955 and February 1956 incident to the termination and settlement of commitments under its contract with plaintiff, including closing out purchase orders, disposing of surplus equipment, and maintaining construction accounting records. From December 1956 through October 1957 Ebasco also rendered services in examining data and records in support of the petition, and testifying at the trial. Finally, Ebasco made certain nonservice expenditures for plaintiff, including various forms of automobile insurance, and workmen's compensation, public liability and property damage insurance.

(b) *Cahill-Gordon* rendered services and made disbursements in connection with the trial of this case, including factual and legal research in preparation for the trial and the conduct of the trial itself. It also rendered services in connection with the claims of the use-plaintiffs and in connection with the termination of the Power Contract.

(c) *Winthrop-Stimson* also rendered services and made disbursements, in connection with the trial of this case. In addition to legal and factual research in preparation for trial, it prepared its own claim and that of Southern, and

conferred with Government representatives with respect thereto, and testified in support of its own claim for services. Its representatives were also present during the trial of the case.

(d) *Mississippi Valley Generating Company* made disbursements or incurred costs subsequent to the filing of the petition, including costs relating to (1) the sale of fixed assets, (2) the reproduction of documents, (3) freight, (4) insurance, (5) telephone calls, (6) printing the pleadings, (7) travel, and (8) reporting certain testimony.

(e) In addition to the foregoing, claims are asserted on behalf of Ebasco; Cahill-Gordon; Winthrop-Stimson; plaintiff; Milbank-Tweed; Willkie-Owen; Middle South; and Southern, for "compensation for the loss of the use of their money represented by their respective claims".

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of one million eight hundred sixty-seven thousand five hundred forty-five dollars and fifty-six cents ($1,867,545.56), said sum representing that amount found to be due the plaintiff on a portion of its claim. The amount of recovery on the remaining portion of the claim will be determined in further proceedings pursuant to Rule 38(c).

U.S. GOVERNMENT PRINTING OFFICE: 1960

FILE COPY

No. ~~650~~ 26

IN THE

Supreme Court of the United States

October Term, 1959.

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To The Use
of Others,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

John T. Cahill,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

Of Counsel:
William C. Chanler,
Robert G. Zeller.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX

IN THE

Supreme Court of the United States

October Term, 1959.

No. 650.

The United States,

Petitioner,

v.

Mississippi Valley Generating Company,
On Its Own Behalf and To The Use
of Others,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

The Court of Claims found without dissent* that Respondent and its creditors (the "use-plaintiffs") had incurred certain expenses** in performance of the terms of the contract involved in this suit. The judgment now sought to be attacked is a judgment for those expenses alone,

---

* The Court's Findings of Fact are set forth in 245 numbered paragraphs printed at pages 86 through 268 of the Appendix to the Petition for a Writ of Certiorari. Although two judges wrote dissenting opinions, no dissent was noted to these Findings.

** Some of these expenses had been paid by Respondent before this suit was brought; most had not. It is the unpaid creditors to whom such expenses were owed who joined as "use-plaintiffs" with Respondent in the suit.

since Respondent did not seek or recover any element of profit.

This contract was *not* a contract born of the desire of Respondent or its Sponsors for Government business. It was a contract initiated by the Government. The origin of the contract has been well stated by Petitioner itself:

> "To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, App., *infra*, pp. 95, 102-103)" (Pet., p. 4).

Not content with a mere request that the Sponsors formulate a proposal which might serve as the basis for negotiating a contract for the purchase of power by the AEC, it was the Government—the Budget Bureau—which took Wenzell on as a part-time consultant without compensation and asked him to stay in touch with the Sponsors as a kind of "expediter", as the Court below found, "to keep their [the Sponsors'] interest alive and to get it into the form of a proposal which the Government could consider" (Pet. App., p. 53).

Wenzell, the alleged double dealer, was not used by the Government at the request of the Sponsors; in fact, they protested his presence and warned that it might prove to be embarrassing (Pet., pp. 18, 21; Findings 68, 78). The Sponsors knew that in the controversy over the general Administration policy in favor of investor-owned power as against Government-owned power, all kinds of fighting—even unfair fighting—would go on. As the Court below accurately stated the matter (Pet. App., pp. 56-57):

> "The sponsors, though they had not employed Wenzell, nor given him any interest in their enter-

prise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' admonition to Hughes [then Assistant Director, and later Director, of the Bureau of the Budget], who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government but adequate to destroy the enemy if it became necessary to resort to such a weapon. There is, it seems to us, something essentially cynical about the Government's Wenzell defense."

Eventually, about eight months after the contract was made, the Government concluded it no longer had any need for the contract. This came about because the City of Memphis decided to generate its own power, thereby eliminating the problem of TVA's need for additional power which the Government had asked the Respondent's Sponsors to come in and solve for it—a problem which they in good faith and with great effort and expenditure of money and time had set about solving. Thus the Government, for its own business reasons, cancelled the contract.

Thereafter, when the political atmosphere became too hot for that same Government which had urged the Sponsors to help—and for the very reasons about which the Sponsors had warned the Government—the Government piously announced that the contract could not be recognized because of conflict of interest resulting from the Government's use of Wenzell.

Counterstatement of Questions Presented.

It is apparent from the foregoing and from the Petitioner's own statement of the facts that Petitioner's statement of the question (Pet., p. 2) is neither fair nor accurate.

From Petitioner's statement of the "Question Presented," one would assume that this was an ordinary case of conflict of interest where an effort is being made to enforce a contract for the benefit of a person who, while acting for the Government in the negotiation of the contract, had a direct or indirect interest in the private contractor which might have tempted him, for his own benefit, to favor the contractor at the expense of the Government. According to Petitioner's statement, the only fact that distinguishes this from the ordinary case is that here the Government had knowledge of its agent's interest. Therefore, Petitioner's statement asserts, the only question presented is whether such knowledge bars the Government from disaffirming the contract.

That could be an interesting question, possibly warranting full consideration by this Court, if a case should arise in which the facts are such that that question is presented. This, however, is not that case, as is shown by the unanimous Findings of the Court below and even by the Petition itself.

Instead the only substantial question presented is: Should this Court lend assistance to the Petitioner's effort further to postpone, at great expense and loss to the Respondent and its creditors, the day when it honors its good faith contractual obligations?

The Court below pointed out that the contract had been made in good faith between Respondent and the Government acting through the Atomic Energy Commission and after hotly contested negotiations; that there was not the slightest suggestion of any "conflict" on the part of those who acted for the Government in the negotiations; that the Respondent performed in good faith until the Government told it to cease performance because the power was no longer needed; and that the Respondent and its unpaid creditors are therefore entitled to compensation for the expenses they thereby incurred. It is likewise clear that no person or corporation alleged to have had a conflict of interest will receive as much as five cents as a result of the judgment sought to be reviewed. On the facts and the law the case is very simple and not one for this Court.

As the Court below stated (Pet. App., p. 57):

> "The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skilful bargaining by representatives of the Government who had complete fidelity to their trust * * *."

The concession made in the Court below is also made here:

> "the final contract turned out to be fair and honest" (Pet., p. 35).

To the extent that there is a legal question involved—certainly not one which merits this Court's attention—it is as follows:

The United States is a party to a contract negotiated for it by the Atomic Energy Commission, as to which the unanimous findings are that it was negotiated in sessions which were lengthy, arduous and hotly contested, that such negotiations lasted from July 7 to November 11, 1954, a period of over four months, and that the representatives of the Atomic Energy Commission who negotiated the contract were competent and aggressive, with no one claiming that they lacked a singleness of purpose in representing the interests of the Government. Over three months before these negotiations began, the Bureau of the Budget, in efforts initiated by the Government, attempted to get the contractor's Sponsors to submit a proposal which could serve as a starting point for negotiations, and in doing so, the Bureau used an unpaid consultant who was an officer and stockholder of an investment banking firm, of which fact the Bureau of the Budget was fully aware. The unpaid consultant had no legal relationship with or interest in the contractor, its Sponsors, or the contract. The unpaid consultant engaged in no act, and had no power, to bind the Government or to make decisions on its behalf; he not only did not participate in the negotiation of the contract but did not even participate in the Government's decision to begin those negotiations. He terminated his consultancy long prior to such decision and negotiations, and this came about as the result of the prompt and effective steps taken by the contractor's Sponsors. Neither he nor the investment banking firm with which he was connected, and which was retained as one of two financial agents after the unpaid consultant had terminated his Government connection, has any interest in this law suit. Under such circumstances may the Government repudiate its obligations under the contract on the ground that the unpaid consultant had an alleged conflict of interest?

Outline of Argument.

As appears from the facts as set forth in the Petition, and as noted by the Court below (Pet. App., p. 56), the most obvious feature of this case is that it contains none of the elements ordinarily found in a conflict of interest situation.

In the first place, neither the Bureau of the Budget nor, *a fortiori* Wenzell, its part-time unpaid consultant, had any responsibility for the negotiation of the contract in question, or ever took any part in such negotiations.

In the second place, Wenzell had no interest in Respondent and no interest in its contract. Wenzell was not an officer, agent, member, employee, or stockholder of Respondent; nor did he have any other legal relationship with Respondent. During the time Wenzell was a Government consultant there was no agreement or understanding, written or oral, formal or informal, contingent or otherwise, with respect to the possibility that First Boston (an independent corporation of which Wenzell was an officer and stockholder) might be retained as a financial consultant by Respondent if a contract between Petitioner's contracting agency (the Atomic Energy Commission) and Respondent should later be made. In other words, even if Petitioner's view be accepted, Wenzell's alleged "interest" could have consisted of no more than a hope that if a contract between the AEC and Respondent should later be made, First Boston might be retained by Respondent to serve as a financial consultant.

In the third place, the Sponsors, as soon as they became aware of the possibility of embarrassment,* not only called

---

* It was apparent that if a contract were entered into and if Respondent decided to retain a financial agent to assist in negotiating a loan from institutional investors, First Boston would be considered for such agency because of its experience in the financing of a previous transaction similar to that under consideration by the Respondent and Petitioner (Findings 27, 68).

the matter to the attention of both the Petitioner and Wenzell's private employer, but also took affirmative steps to obtain his removal from his Government employment.

And finally, the record shows conclusively that as a result of Respondent's efforts, Wenzell was directed to wind up his activities and withdraw as a Government consultant as soon as possible, and he actually did so before the Sponsors had even formulated the proposal which later became the subject matter of negotiation. This all happened three months before negotiation of the contract was commenced, and seven months before the contract was entered into.

One would assume that a mere statement of these facts, all of which are incontrovertibly established by the Findings, would constitute a sufficient answer to any attempt by Petitioner at this time to disaffirm the contract as against Respondent, the contractor. We submit also that an examination of the petition will disclose that Petitioner is fully aware of the significance of these facts, and of the necessity of explaining them away.

For after arguing ineffectually that Wenzell had violated Section 434, Petitioner turns to the problem of using his alleged violation against Respondent. In doing so, Petitioner concedes that the "conflict" could have been effectively "removed" and the "air" cleared of any "taint" if the contractor had taken proper steps to that end. Ignoring the fact that the steps actually taken by the Sponsors resulted in Wenzell's timely removal and in thus effectively "clearing the air", Petitioner blandly asserts that while the means of accomplishing that purpose were "so readily at hand and so simple to apply, [they] were not used" (Pet., p. 39).

Petitioner seeks to support this astonishing proposition by arguing that the only proper course would have been

for the Sponsors "to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction" (Pet., p. 38). Instead of calling the situation to the attention of Wenzell and of both his Government and private employers and thereby procuring his removal, as the Sponsors did, Petitioner insists they should have brought pressure directly on First Boston to force Wenzell's prompt removal, thus avoiding the possibility that his Government superiors would prove to be "complacent, ignorant or negligent officials" (Pet., p. 39).*

Thus, the points really raised by the Petition are first, whether under the uniquely complex facts of this case, Wenzell did violate Section 434; and, secondly, can the Government disaffirm the contract as against Respondent because Respondent, instead of bringing pressure on First Boston, permitted the Government's interests to remain with two of its highest administrative officials—the Director and the Assistant Director of the Bureau of the Budget, reporting directly to the President.

We shall argue that Petitioner's contention on the first point is refuted by the record; and that, on the simple principle of *de minimis*, the second point, which is crucial to Petitioner's case, is not worthy of the serious attention of this Court. We shall also show that no question of importance to the future construction and application of the principles of conflict of interest is raised by this record. Having set forth such argument and showing, we shall stop; for we do not conceive it to be our function in this brief to argue the merits of questions which are purely factual or unimportant.

---

* Incidentally, there is nothing in the Findings or the record which would lend a scintilla of support to any inference that Wenzell's superiors were "complacent, ignorant or negligent".

ARGUMENT.

I.

IT IS CLEAR FROM THE FINDINGS THAT WENZELL WAS NOT "AN OFFICER OR AGENT OF THE UNITED STATES FOR THE TRANSACTION OF BUSINESS" IN CONNECTION WITH THE POWER CONTRACT AND THAT HE DID NOT VIOLATE SECTION 434.

The Petitioner's argument that Wenzell violated Section 434 proceeds as if Wenzell were suing for compensation for his services as a part-time consultant or First Boston for a fee, or as if Wenzell or First Boston were among the use-plaintiffs who would get paid for the work they did if the judgment below was permitted to stand. The Petitioner thus conveniently ignores the fact that neither Wenzell nor First Boston will obtain anything under the judgment below and similarly closes its eyes to the vital question whether Wenzell acted as an officer or agent of the United States for the transaction of business *in connection with the very contract upon which suit was brought and judgment was entered.*

The reason for this is plain. The unanimous Findings establish that Wenzell did not and could not, both from the standpoint of time and function, act in this capacity.

A. It Was Unanimously Found Below that Wenzell Had No Part in the Negotiation of the Contract.

The Bureau of the Budget had no responsibility for and took no part in the negotiation of the contract. That was solely the responsibility of the AEC (Findings 34, 130, 131). The function of the Bureau was to determine, as quickly

as possible, whether the Government's policy of arranging for the supply of power for the AEC by private utility interests rather than by the TVA was sufficiently feasible to justify the Bureau's previous elimination from the budget of the appropriation for the construction of the proposed Fulton Plant by the TVA (Findings 37, 40, 45). It was only in connection with this preliminary exploratory phase that Wenzell acted (Finding 45). Thus, from the very nature of his consultancy, he had no power or authority to conduct any negotiations on behalf of the Government and he did not do so.

The last thing Wenzell did as an unpaid consultant to the Bureau of the Budget was done on April 3, 1954 (Findings 55, 74, 106).

We cannot improve upon the emphatic voice with which the unanimous Findings of the Court below establish that Wenzell had no part in the negotiation of the contract:

"G. *The Negotiation of the Power Contract*

"133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.

"The AEC's team of negotiators was headed by Cook [Deputy General Manager of the AEC] and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

"The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

"From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 10, 1954, the Government insisted on two new contract provisions, and it was doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract.

"134. On August 18 Nichols [General Manager of the AEC] and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

"Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. A', the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as 'major concessions from the company' which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

"135. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times, Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

"136. *Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation*" (Pet. App., pp. 159-161).*

It is to be noted that both dissents in the Court below are at war with the unanimous Findings. To illustrate, Mr. Justice Reed mistakenly speaks of Wenzell's "assistance in the negotiation" (Pet. App., p. 76) and Wenzell's continuing "to negotiate for the Government" (Pet. App., p. 80). The fact is that Wenzell did no negotiating because negotiating did not start until July 7, 1954, three months after Wenzell left the Government.

The same comment applies to the dissent by Chief Judge Jones. Indeed, he starts by agreeing with Justice Reed. While he speaks broadly of various matters in which Wenzell participated, the nub of his argument is: "At least we know that he procured and furnished to the Budget Bureau and to the sponsors information on the probable cost of interest on money to be borrowed by the plaintiff" (Pet. App., p. 83). That was long prior to the contract negotiations, and surely is not negotiating or transacting business. The actual cost of money, not the estimate, controlled the contract (Finding 102). Getting the "probable cost" is like getting a weather prediction. The prediction may be that it will be a sunny day, but Providence alone will determine whether the day will be sunny. So here the prediction was that the interest rate on the debt portion of the MVG securities would be 3½%. The money market, when the securities were actually contracted for, resulted in a higher rate.

Thus, Chief Judge Jones adds nothing to the case which requires review in this Court.

---

* Emphasis supplied throughout.

B. It Was Unanimously Found Below that Wenzell Had No Part Even in the Decision that Negotiations Should Be Opened with the Sponsors.

Here again the unanimous Findings of the Court below cannot be improved upon. Again we call the attention of this Court to the fact that the last time Wenzell did anything as an unpaid consultant to the Budget Bureau was on April 3, 1954. The Findings are:

"F. *The Decision to Negotiate a Contract on the Basis of the April 10 Proposal*

"129. Following the submission of the April 10 proposal, Hughes held a conference with Clapp [Chairman of the TVA] and Nichols, together with staff members from TVA, AEC, and the Budget Bureau, at which time it was agreed that TVA and AEC would make a joint analysis of the proposal and that Adams [Chief of the Bureau of Power, Federal Power Commission] would participate for the Budget Bureau. An intensive review and analysis of the proposal was made, and in connection therewith, representatives of the sponsors met with the Government's representatives to discuss aspects of the proposal and furnish additional information when requested.

"On April 24, 1954, Hughes sent the President a memorandum, reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors and that the Bureau be further authorized to instruct TVA and AEC to work out related interagency arrangements.

"On April 28, 1954, Hughes and the AEC received a telegram from a group headed by Von Tresckow, stating

that they proposed to submit a proposal to AEC and that it would be more favorable than any other of which the group had knowledge. The Von Tresckow proposal was received by AEC on May 27, 1954, and was subjected to a review and analysis during the period June 3 to June 5. As a result, no decision was then made by the Government to negotiate a contract with the sponsors on the basis of the April 10 proposal.

"130. On June 14, 1954, a comparative summary analysis of the sponsors' proposal, the Von Tresckow proposal, and estimated TVA costs for the Fulton plant was presented by Hughes and Strauss [Chairman of the AEC] to congressional leaders in conference with the President. At that time, the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors.

"On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract on a basis generally within the terms of the proposal, and instructing TVA and AEC to work out the necessary contractual, operational, and administrative arrangements between the two agencies so that operations under the contract would be carried out in the most economical and efficient manner.

"131. On June 30, 1954, AEC wrote the sponsors in part as follows:

> As Mr. Cook informally advised Mr. Dixon this date, your proposal dated April 10, 1954, offering to furnish 600,000 kw of firm power in the Memphis

> area constitutes a satisfactory basis for negotiation of a definitive contract.
>
> We are ready to begin negotiations.

"The sponsors did not know of the defendant's decision until June 30, 1954. *The sponsors' proposal was a firm offer but, as indicated by the quotation above, the AEC letter was not an acceptance; it was simply a statement that AEC was ready to begin contract negotiations*" (Pet. App., pp. 157-159).

C. From What Has Already Been Shown as to What Wenzell Did Not Do, Detailed Analysis of What Wenzell Did Do Is Wholly Immaterial.

This is a suit on a contract. Once it is recognized, as it must be from the lower Court's undisputed Findings, that Wenzell did not act as "an officer or agent of the United States" for the transaction of business *in connection with that contract*, whatever else he may have done is wholly beside the point.

We would like to point out, however, that examination of the unanimous Findings will disclose that Wenzell's activities related almost entirely to a proposal which wound up in the wastebasket nearly four months before the negotiation of the contract began.

This was the proposal of February 25, 1954. On March 24, 1954, the Sponsors were advised that this proposal was unsatisfactory (Finding 93). As the Petition itself recognizes:

> "The sponsors *then began to develop a new proposal* which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, App., *infra*, pp. 139, 141, 142). After modifying the proposal in

> the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, App., *infra*, pp. 143, 146)" (Pet., p. 7).

The unanimous Findings show that as early as March 1, Wenzell was pointing out to his superiors in the Bureau of the Budget that his competence was limited; and that on March 9 he stated to the then Director of the Budget Bureau, Dodge, that "he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Findings 74, 85). Adams was substituted for Wenzell by March 23 (Findings 91-92). "Since Adams had been called in by the Bureau to advise it on the cost of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954" (Finding 94). As shown above, it was not until after March 23 that work on the April 10 proposal even began.

It was the proposal of April 10—not the proposal of February 25—which was before the parties when negotiation of the contract began on July 7 (Findings 131, 133).

We will not burden the Court with other reasons, sustained by the Court below, why Wenzell did not violate Section 434. We believe the discussion we have included should be sufficient to satisfy the Court that this case is factual, not legal, and that there are no problems concerning the proper application of Section 434 raised by these facts of sufficient importance either to require or to merit review by this Court.

II.

THE ONLY ISSUE RAISED BY THE PETITIONER OTHER THAN THE ALLEGED VIOLATION OF SECTION 434 IS WHETHER THE SANCTION OF NON-ENFORCEMENT CAN BE INVOKED AGAINST THIS CONTRACT DESPITE THE SUCCESSFUL EFFORTS OF THE CONTRACTOR TO BRING ABOUT WENZELL'S TIMELY REMOVAL, SOLELY ON THE GROUND THAT AN ALLEGEDLY MORE EFFECTIVE METHOD OF OBTAINING HIS REMOVAL WAS AVAILABLE.

After attempting to establish the proposition that Wenzell violated Section 434, the Petitioner turns to the problem of relating the alleged violation to Respondent, and showing why what is called "the sanction of non-enforcement" should be imposed as against it under the circumstances here present.

As we have seen, and as noted by the Court below (Pet. App., p. 56), the factual situation presented by this record is unusual. Normally, the sanction is invoked in order to prevent the person alleged to have had the conflict of interest from recovering any benefits he may have obtained as a result of his activities. Here the petitioner is not seeking to invoke the sanction against Wenzell. He has no interest, direct or indirect, either in the contract itself or in this lawsuit. Neither he nor his employer First Boston has ever received or claimed as much as five cents of compensation, directly or indirectly, either from the Government or from the Respondent, under this contract.

Instead, the Government is attempting to invoke the sanction against those who do have an interest in the contract, the Respondent and its seventeen unpaid creditors who are the use-plaintiffs in this case. Not only did the Sponsors not retain Wenzell or have any legal relationship

with him whatever, but as soon as they became aware of Wenzell's position, they took reasonable and proper steps for the purpose of having him removed from the scene, and succeeded in having him removed from the scene before any "taint" or "conflict" could arise.

One would assume that this state of facts would dispose of any contention that the Government can now repudiate the contract. And this, we submit, is evidently recognized by the Petitioner. For it devotes a considerable portion of its argument to an effort to explain it away. But its effort to do so is so ineffectual, and indeed almost frivolous, as to show that this record raises no issue requiring review by this Court.

This effort consists of the argument that the Sponsors should have but did not take the proper steps to "remove that conflict" (Pet., p. 38). The Sponsors, argues the Petitioner, "had only to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction" (Pet., p. 38). Thus, "the means of clearing the air of the taint were so readily at hand and so simple to apply, but *were not used.* * * * Finally, the sanction of non-enforcement—not unfair to contractors who have reason to know of the conflict-of-interest *but do not take what action they reasonably can*—is an effective and appropriate supplemental remedy against contravention of the Congressional mandate by complacent, ignorant, or negligent officials, [*] as well as by conniving or negligent double-agents. If that remedy exists here, actual and potential contractors will not content them-

* Petitioner elsewhere accuses Hughes and Dodge of attempting unlawfully to "waive" Section 434, although there is not the slightest hint either in the Findings or in the record that these two high administration officers did not act throughout with a complete singleness of purpose in furthering the interests of the Government. See Petition, pp. 36, 37.

selves with merely expressing concern over a conflict-of-interest" (Pet., p. 39-40).

In other words, Petitioner, although conceding that if proper steps to "remove the conflict" had been taken by Respondent, the contract would have been enforceable, contends that the "sanction of non-enforcement" must be imposed here because Respondents acted, and correctly, on the basis that the Director and Assistant Director of the Bureau of the Budget, two high-ranking officials of the Government responsible directly to the President, were competent to protect the Government's interests once Respondent had seen to it that the facts were fully disclosed to these officials. Now, says the Petitioner, a contractor in such a situation as this must also, officiously, bring pressure upon the unpaid consultant's private employer so as to deprive the Government of an advisor whom its high officials desire and believe it proper to retain.

As we shall show in the next point, the steps actually taken by Respondent were just as reasonable and appropriate at the time the situation arose as those now suggested, and they proved effective. Far from contenting themselves with "merely expressing concern over a conflict-of-interest" when Wenzell continued to appear at meetings, the Sponsors followed through on their original suggestion that he should be removed by taking the matter up directly with Hughes himself. Moreover, the record shows that Hughes and Dodge, far from "waiving" the statute or "condoning" Wenzell's alleged violation of law, advised him that, although there was no existing conflict at the time, he should wind up his work as quickly as possible and withdraw. And he did so before the termination of the preliminary exploratory discussions.

It becomes important, in view of the Government's reliance on this proposition, to review with some care just

what the Sponsors did, what Hughes and Dodge did, what Wenzell himself did after the possible consequences of Wenzell's position were recognized, and what the results of their actions were. For when these facts as they are incontrovertibly set forth in the unanimous Findings are examined, it will be clear that the determination of whether the Government's newly suggested "solution" would have been substantially better or quicker than the one actually used by the Sponsors presents an issue so clearly within the principle of *de minimis* that it presents no question requiring review by this Court.

III.

IT IS CLEAR FROM THE RECORD THAT THE STEPS TAKEN BY THE SPONSORS TO OBTAIN THE REMOVAL OF WENZELL WERE A MORE PROPER AND EFFECTIVE MEANS OF "CLEARING THE AIR" THAN THE ALTERNATIVE STEPS NOW ADVANCED BY PETITIONER.

Some time in February of 1954, Daniel James, Dixon's counsel, became concerned lest embarrassment might result from Wenzell's position with the Government in the event that a contract should ultimately be agreed upon and First Boston should be selected to assist in obtaining the necessary financing. He discussed the problem with Dixon, and on February 23 Dixon took the matter up with Wenzell, suggesting that "Wenzell discuss the situation with the Bureau of the Budget and his counsel" (Finding 68). On the same day, Wenzell discussed the matter in some detail with Hughes, who "replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore

the question with counsel, and then to talk with Dodge about the matter" (Finding 69).

Thereafter, Wenzell discussed the matter with First Boston and its counsel, and was advised by the latter to resign at once and in writing. Petitioner attempts to make much of the fact that Wenzell did not follow this advice. The validity of this attempt is, to say the least, highly questionable in view of the wholly inchoate state at that time of the possibility of there ever being a contract to be negotiated with Respondent and the fact that Hughes had told Wenzell the matter was being exaggerated, instructed him to discuss it with Dodge, and continued to give him assignments.

In any event, even if Wenzell were at fault in following the advice of Hughes, his immediate Government superior, rather than that of First Boston's counsel, it is difficult to see what bearing that fact would have on the present claim of Respondent. For the record shows that after the initial conversation with Wenzell, James followed up with Dean, First Boston's lawyer, and Dixon followed up with an official of First Boston, from whom he learned "that First Boston's counsel had advised Wenzell to resign his position with the Bureau of the Budget at once" (Finding 78).

The record also shows that while First Boston's president, Coggeshall, assumed that Wenzell would follow counsel's advice, Messrs. Dean and Raben, the counsel in question, followed up by telephoning Wenzell on March 3 and again on March 10. At the time of the latter conversation "from the statement Wenzell made, Raben decided that Wenzell's decision to resign was an accomplished fact and that the resignation would be submitted momentarily. Consequently, Raben took no further action on the matter" (Finding 79).*

---

* As will be shown, this conversation took place the day after Wenzell agreed with Dodge that he would wind up his affairs and terminate his work as quickly as possible.

Meanwhile, when Dixon and James found that Wenzell was continuing to attend meetings at the Bureau after February 23, they took the matter up with Hughes himself: "Although James had understood that Wenzell was going to resign, he had learned that Wenzell was occasionally taking part in meetings of the Budget Bureau and James wanted to know why Wenzell was continuing to act as a consultant to the Bureau. * * * Hughes made no comment on the matter" (Finding 78).

On March 9 Wenzell called on Dodge and raised with him the problem of Wenzell's continued consultancy to the Bureau, as he had been instructed to do by Hughes. Dodge pointed out to Wenzell that "at that time, there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be expected before the question of financing would arise. However, Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible. Wenzell replied that he would terminate his work in the Bureau soon" (Finding 85).

At the same conference with Dodge "Wenzell stated that he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Finding 85).

That Wenzell did what Dodge told him to do—finish his work with the Bureau as quickly as possible—is established. On that same day, March 9, Wenzell attended a meeting at the Bureau at which an analysis of the Sponsors' proposal of February 25, prepared jointly by the AEC and TVA, was

discussed. Wenzell joined in the general opinion that the estimates of cost were too high and was ~~asked to speak to~~ the Sponsors in order to "determine whether the sponsors would submit a better proposal" (Finding 84). Thereafter, Wenzell attended two more meetings at the Bureau, on March 11 and 16, at which the joint AEC-TVA analysis was further discussed. On the latter date, Wenzell again suggested that Adams be brought in and requested to make an independent analysis of the February 23 proposal (Findings 87, 89).

The meeting of March 16, held one week after Wenzell's conversation with Dodge, really marked the end of Wenzell's active participation as a Budget Bureau consultant. His replacement, Adams, began acting as a technical consultant to the Bureau on March 19, 1954 (Finding 91). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell "'to make sure that he (Wenzell) had turned everything over to Adams'" (Finding 92). The next day, "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (Finding 92).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Findings 94, 97, 98).

Thus, it is evident that as a direct result of the "expressions of concern" by the Sponsors to Wenzell's Government superiors, both Wenzell and his Government superiors took steps to terminate his consultancy as soon as possible without interfering with the turning over of his duties to Adams.

In view of these facts, the unreasonableness of Petitioner's argument that Respondent's salvation is dependent on the Sponsors' also having put pressure on First Boston to get Wenzell out of the Government is almost incredible. Suppose they had done so and that Wenzell had disobeyed Dodge's instructions to wind up his work before getting out. Respondent would in that event, undoubtedly now be charged with having deviously deprived the Government of the services of a valuable consultant, and Wenzell's consistent position that the estimates in the Sponsors' February 25 proposal were too high (Finding 74) would be pointed to as the sordid motive for the Sponsors' desire to be rid of Wenzell.

To suggest, as the Petition does, that the failure of Hughes and Dodge to fire Wenzell forthwith when the matter was first brought to Hughes' attention on February 23 constituted an attempt by them to "waive" Section 434—which now appears to be an important part of the Government's contention that the "conflict" was not successfully "removed"—is, we submit, manifestly absurd. It was perfectly true at that time, as both Hughes and Dodge pointed out, that the problem was being exaggerated. For there was in fact "no proposal that could be used for a basis of negotiation" before the Government at that time, and there would not be one for some time to come. Dodge and Hughes were perfectly familiar with what Wenzell was doing, and were undoubtedly aware that Wenzell's participation as a consultant to the Bureau during the exploratory discussions as to the feasibility of the project did not constitute any violation of law or any improper activity on his part. What they did was not an attempt to "waive" Section 434. It was a successful attempt to prevent any possibility

of its violation without interfering with the progress of the exploratory discussions.*

The Petitioner intimates that Hughes and Dodge should have consulted the Attorney General (Pet., p. 36). We submit that if all the facts, including the true nature of Wenzell's employment by the Bureau had been submitted to the Attorney General by Hughes on February 23, he would have advised that they take precisely the course that Hughes and Dodge did take: To tell Wenzell to wind up his activities as soon as possible and withdraw before any problem of conflict could arise. The unanimous Findings show this is precisely what happened.

The decision of the Court below, on the facts as found, establishes a very demanding precedent. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of the Government, to prevent the development of any conflict which might conceivably harm the Government in its dealings with private contractors.

* The Government also complains that "despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell, dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract" (Pet., p. 39). We would point out that during the period of Wenzell's Government consultancy, these "services" of Wenzell's consisted of his complying with the instruction which Hughes, his Government superior, had given him (Finding 55).

Nor do we see the relevance of the fact that after the termination of Wenzell's Government employment, Respondent retained First Boston as one of its financial agents. On Petitioner's theory, Wenzell's "interest" which vitiates the contract consisted of his alleged hope that First Boston would be retained. This so-called "interest" would have existed even if the Sponsors had decided not to retain First Boston, but instead to obtain the financing themselves. The hope could have existed whether or not it was ever fulfilled.

We submit that this Court should give short shrift to the cynical attempt of the Petitioner to repudiate its obligations under a concededly fair and honest contract (Pet., p. 35) on the alleged ground that, in the light of hindsight, Hughes and Dodge, two of the highest officers of the Government of the United States, responsible directly to the President himself, did not act on the Sponsors' suggestion that they get rid of Wenzell as expeditiously as the Petitioner now, for the purpose of avoiding its honest debts, contends they should have done.

Section 434 was enacted to prevent the Government from being cheated, not to enable the Government to cheat honest citizens. The public interest will not be served by permitting it to be perverted for such a purpose.

Conclusion.

The Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

John T. Cahill,
Attorney for Respondent.

Of Counsel:

William C. Chanler
Robert G. Zeller

Dated: March 16, 1960

COPY

No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
HOWARD E. SHAPIRO,
Attorney,
Department of Justice, Washington 25, D.C.

INDEX

560684—60——1

CITATIONS

Cases:

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 26

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the Court of Claims (R. 1–46) are reported at 175 F. Supp. 505.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1959 (R. 235). A timely motion for a new trial was denied on October 7, 1959 (R. 235). By an order dated January 5, 1960, the Chief Justice extended the time for petitioning for certiorari to and including January 19, 1960 (R. 236). The petition for certiorari was filed on January 19, 1960, and granted on April 4, 1960 (R. 237). 362 U.S. 939.

The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

A contract between the Government and the respondent resulted from a proposal developed in negotiations between the Government and the business entity which organized respondent. One of the significant persons transacting business for the Government with that business entity during these negotiations had, through a probable subcontractor under the proposed contract, an indirect financial interest in the contract, which was known to his superior officers in the Government. The ultimate question presented is whether the contract is a valid obligation and enforceable against the United States.

STATUTE INVOLVED

18 U.S.C. 434 provides as follows:

> Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

STATEMENT

This is a suit against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, by respondent, an Arkansas corporation (F. 1,

R. 49)[1], to recover on behalf of itself, and for the use of twenty-four other parties, certain termination costs and damages which it claims under a Government contract (R. 49) to deliver electric power to the Atomic Energy Commission (AEC) (F. 2, R. 49). The contract was signed November 11, 1954 (F. 3(c), R. 50) and became effective December 17, 1954 (F. 8, R. 51). On August 1, 1955, respondent was advised by a letter from the Chairman of the AEC that the President of the United States had ordered termination of the contract because the Government no longer required the power (F. 19, R. 55). Termination discussions between the AEC and respondent were broken off the following October; on November 23, 1955, the AEC wrote respondent that "upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government" (F. 20, R. 56). This conclusion was based upon a review by AEC's General Counsel of the role which Adolphe H. Wenzell, a consultant to the Bureau of the Budget, had played in the development of the offer which formed the basis of the contract (F. 128, R. 118).

The pertinent facts found by the Court of Claims are as follows:[2]

---

[1] "F.—" refers to the findings of fact by the Court of Claims, (R. 47–235).

[2] We do not challenge the court's findings of fact.

I

THE CONTRACT

A. THE PURPOSE OF THE CONTRACT

The purpose of the contract was to provide additional electric power for the area around Memphis, Tennessee. The Tennessee Valley Authority anticipated a power shortage in the Memphis area, which it served. The Authority's existing capacity was fully committed; in part, this full commitment derived from its heavy obligation to furnish power to AEC's facilities in the Tennessee Valley region (F. 36, R. 63–64). To meet the expanding demand in the Memphis area, the Authority wished to increase its existing power production facilities by constructing a steam-operated generating plant at Fulton, Tennessee (F. 36, R. 63–64).

To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, R. 57, 63–64). The Commission had such an arrangement with the Ohio Valley Electric Corporation for its facility at Portsmouth, Ohio (F. 27, R. 59); a plant was also under construction by Electric Energy, Inc., headed by James W. McAfee, to furnish some power to AEC's plant at Paducah, Ky. (F. 37, R. 65).

On December 2, 1953, Joseph M. Dodge, then Director of the Bureau of the Budget, asked the AEC whether further expenditures for TVA could be

avoided by having AEC contract for 450,000 kw of private power for its Paducah plant and then release a like amount to TVA (F. 37, R. 64). The Commission put the question to McAfee, who is also President of Union Electric Company (F. 37, R. 65). McAfee advised that he believed a private group could be formed to construct such a plant (F. 37, R. 65). He notified another utility executive, Edgar H. Dixon, the head of Middle South Utilities, Inc., and on December 23, 1953, Dixon came to Washington to discuss the matter with the AEC (F. 39, R. 66).

On the basis of the advice from McAfee, the Bureau of the Budget concluded that the AEC could arrange for private power to meet its needs. Accordingly, a statement was drafted for inclusion in the President's Budget Message to be delivered to Congress on January 21, 1954, to the effect that arrangements were being made to relieve TVA's commitments to the AEC and to make available an equivalent amount of power for the use of other TVA consumers (F. 41, R. 68).

B. DEVELOPMENT OF A FIRM PROPOSAL FROM THE DIXON-YATES GROUP

Dixon and McAfee had suggested that the Government's power problem could be solved if either the City of Memphis or TVA entered into a contract with private utilities to construct a plant in the Memphis area (Fs. 39, 42, R. 67, 69). Objections to having the AEC contract for additional power at Paducah were discussed between AEC and the Bureau of the Budget in January 1954, and AEC was

asked by the Budget Bureau to explore the matter further with the utility executives (F. 43, R. 69).

The Commission's staff met with Dixon and McAfee on January 20, 1954, and after discussions both in the Commission and in the Bureau of the Budget, the Government requested the utility company executives to consider the construction of a power plant to deliver power to AEC at Memphis, instead of at Paducah, for transfer to TVA (F. 51, R. 74). It was decided that Dixon should prepare a study of the cost factors pertaining to construction of a plant across the river from Memphis (F. 53, R. 75). Dixon and his staff began to draw up such a proposal. McAfee thereafter informed Dixon that he was not interested in participating in a project to build a plant at Memphis, since the location was outside his companies' pool area (F. 63, R. 80). On February 20, 1954, the Southern Company, headed by Eugene Yates, accepted an invitation from Dixon to fill the vacancy left by withdrawal of McAfee (F. 65, R. 81).

After numerous contacts with Budget Bureau representatives and the AEC staff, Dixon and his staff, on February 25, 1954, submitted the first formal proposal to the Government on behalf of Middle South Utilities and the Southern Company (the sponsors)[3] to construct a plant to furnish 600,000 kw of power to the TVA at the Tennessee line, for the account of AEC (F. 71, R. 86). Following an analysis of this first proposal by the Budget Bureau, the AEC, and

[3] By virtue of the names of the heads of the two companies, Messrs. Dixon and Yates, the sponsoring entity is frequently referred to as Dixon-Yates, the Dixon-Yates group, or the Dixon-Yates entity.

the TVA, during which the sponsors' staff was regularly consulted by the Government, Dixon's engineer was advised on March 24 that the proposal was too high (F. 93, R. 99). The Government requested the sponsors to develop a further estimate (F. 93, R. 99).

The sponsors then began to develop a new proposal which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, R. 100, 102, 103). After modifying the proposal in the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, R. 104, 106).

Although the Government had tentatively decided before January 20, 1954, to seek a contract of this nature with private companies (F. 45, R. 70), there had been no firm decision at that time. The President's budget message of January 21 stated that new TVA units would be reconsidered if negotiations to meet AEC's load requirements were not consummated as contemplated (F. 41, R. 68). On March 3, 1954, the AEC informed the Budget Bureau that either the President or Congress would have to determine the course of action which would be in the best interests of the Government (F. 80, R. 93).

C. NEGOTIATION AND PERFORMANCE OF THE FINAL CONTRACT

On the basis of analysis of the sponsors' second proposal of April 1954, the Director of the Bureau of the Budget recommended to the President that he be authorized to instruct AEC to complete arrangements with the sponsors for a contract, and to instruct

TVA and AEC to work out the necessary interagency arrangements (F. 129, R. 119).

On April 28, the Budget Bureau and the AEC received a telegram from another utility group, headed by a Mr. Von Tresckow, which offered to submit a proposal which would be more favorable (F. 129, R. 119). In early June, the Von Tresckow proposal was analyzed by the Government (F. 129, R. 119). On June 14, the Dixon-Yates and Von Tresckow proposals, together with cost estimates for a TVA plant at Fulton, Tennessee, were laid before the President of the United States and Congressional leaders (F. 130, R. 119). The President stated that the AEC would be instructed to negotiate with the Dixon-Yates group (F. 130, R. 119). The instructions were issued on June 16, 1954 (F. 130, R. 119).

Formal negotiation of the contract between AEC and the sponsors, based upon the Dixon-Yates proposal dated April 10, began on July 7, 1954 and terminated on November 11, 1954, with the signing of a contract (F. 133, R. 120). The Government's negotiators for the formal contract were competent and aggressive; the negotiating sessions were lengthy, arduous, and hotly contested; the Government insisted on certain new provisions; and the representatives of the sponsors were not successful, in their attempt to limit the Government negotiators to the provisions of the April proposal. In a general way the contract was within the terms of the proposal, but there were numerous changes and additions (Fs. 133–134, R. 120-121). The contract was thoroughly reviewed by the interested agencies of the Government, and was sub-

mitted to the Congressional Joint Committee on Atomic Energy (Fs. 134–135, R. 121–122). As indicated below, Adolphe H. Wenzell had nothing to do with the negotiation of the formal contract (F. 136, R. 122).

By the time of the termination of the contract, the respondent had used its best efforts to comply with the contract provisions which were then operative (Fs. 16–17, R. 54–55), and no representative of the Government had indicated that respondent had failed in any way to discharge its obligations under the contract (F. 21, R. 56).

II

THE ROLES OF ADOLPHE H. WENZELL AND THE FIRST BOSTON CORPORATION

Adolphe Wenzell served as a consultant to the Bureau of the Budget in connection with this project during the period a proposal was being developed (*supra*, pp. 5–7); he did not take part in the later negotiations for a firm contract (*supra*, pp. 7–9). His Government service in this connection began January 18, 1954, and ended in April 1954. He considered his relationship with the Government to have terminated on April 10, 1954, the effective date of the sponsors' second proposal (F. 105, R. 106). The Court of Claims has found that Wenzell performed no actual services for the Government after April 3, 1954 (F. 106, R. 106).

A. WENZELL'S CONNECTION WITH THE FIRST BOSTON CORPORATION

Wenzell was a Vice-President and director of the First Boston Corporation, a leading investment bank-

ing firm, and was an engineer specializing in utility financing (F. 25, R. 58). He was paid a salary plus a bonus based upon the amount of business he brought to the firm. He received such a bonus for 1954 (F. 125, R. 117). He also held 200 shares of stock in the firm, in his wife's name (F. 125, R. 117).

First Boston had previously been employed in the financing of the Ohio Valley Electric Company, the utility furnishing power to the AEC at Portsmouth, Ohio (*supra*, p. 4). For its services it received a fee of $150,000, plus $20,000 for expenses (F. 27, R. 59).

B. WENZELL'S GOVERNMENT SERVICE AS A CONSULTANT

1. *In general.* Wenzell's services were first offered to the Government in May 1953 when George Woods, Chairman of the Board of Directors of First Boston, suggested to Budget Director Dodge that Wenzell was well qualified to make a study desired by Dodge of the federal subsidy to TVA (Fs. 24, 25, R. 57, 58). Wenzell served as consultant to the Budget Bureau, making this study, from May to September 1953 (Fs. 26, 28, 29, R. 58–60). The study contained certain recommendations, but these were not a factor in the decision by the Budget Bureau that AEC should seek a contract with private utility companies (F. 33, R. 62).

After the Budget Bureau had requested the AEC to further explore, with utility executives Dixon and McAfee, the feasibility of a power plant at Paducah or Memphis (*supra*, pp. 4–6), the Assistant Director of the Bureau, Rowland Hughes, who was overseeing this matter (F. 38, R. 66), suggested to Director

Dodge that Wenzell should be recalled (F. 45, R. 70). Wenzell was to serve as a consultant during the exploratory discussions, in the area of comparative costs, particularly interest costs (F. 45, R. 70), an important item (Fs. 55, 67, R. 76, 84). On January 14, 1954, Hughes asked Wenzell to come to Washington (F. 46, R. 70). This was the first contact with the Government Wenzell had in connection with the development of this project.

In Washington, Assistant Director Hughes told Wenzell about the President's Budget Message, reviewed the prior discussions with the utility executives, and said that great speed was needed to develop the project (F. 46, R. 70). Wenzell was again hired by the Budget Bureau as a part-time consultant without compensation, but was to receive his transportation expenses and a per diem subsistence allowance from the Government (opinion below, R. 5, 12–13; Fs. 45–46, 99, R. 70–71, 101).

After learning that Wenzell knew both Dixon and McAfee, Hughes asked Wenzell to attend, on behalf of the Budget Bureau, the meeting scheduled for January 20 (*supra*, p. 6) and to use such influence as he had with the private utility people to impress upon them the need for prompt action (F. 46, R. 71). Wenzell, accompanied by a First Boston officer (Paul Miller),[4] attended the meeting of January 20, at which it was agreed between the Government and the utility executives that Dixon should make a study of the project (Fs. 50, 51, R. 73–75). Since Dixon had to

---

[4] See *infra*, p. 22.

leave on a trip, it was also agreed that Wenzell would contact the engineering firm which serviced Dixon's projects, Ebasco Inc., and explain to them what was required (F. 53, R. 75).

Wenzell had been asked by Assistant Director Hughes to stay in touch with Dixon and his associates on the development of a proposal and, particularly, to help point up the real cost of money to be used in financing the project (F. 55, R. 76). He advised both Hughes and the Dixon group on this matter throughout the period of his service (F. 55, R. 76).

During the period the Government and the sponsors were developing the proposal of February 25th (*supra*, pp. 6–7), Wenzell's assignment as a consultant related primarily to the cost of money (F. 74, R. 89). From March 1, 1954, until the completion of his service, his function related principally to the total cost of the project (F. 74, R. 89).

2. ***Wenzell's dealings with the sponsors (Dixon-Yates) on behalf of the Government.*** From the meeting of January 20, 1954, until April 10, 1954, the date he believes his service as a consultant ended, Wenzell was in frequent contact with the sponsors on behalf of the Government.

While serving as a Budget Bureau consultant, he met privately with the sponsors or members of their staffs on January 27 (F. 55, R. 76); February 3 (F. 56, R. 76); February 4 (F. 57, R. 76); February 14 (F. 61, R. 79). He attended the meeting on February 19 at which Dixon successfully persuaded the Southern Company to join the project (*supra*, p. 6).

On March 16, he made changes in his own handwriting on a copy of the sponsors' draft reply to a TVA-AEC analysis of their first proposal (F. 90, R. 98).

In addition to the foregoing meetings alone with the sponsors or their staffs, Wenzell met with them together with other Government representatives at the crucial meeting on January 20 (F. 50, R. 73); on February 8, when TVA financial statements not available to the public were reviewed by members of the sponsors' staff preparing the first proposal (F. 59, R. 77); February 23, when a tentative draft of the first proposal was discussed with the AEC staff and Assistant Budget Director Hughes (F. 66, R. 81); March 2, when the Budget Bureau staff reviewed the first proposal with Dixon's engineer (F. 75, R. 89); March 15, when the Government reviewed with the sponsors their first proposal, in the light in a joint AEC–TVA analysis (F. 89, R. 97); and April 3, when new cost estimates for the sponsors' second proposal were discussed with them (F. 97, R. 100), and Wenzell was asked to encourage the sponsors to refine their figures farther (*infra*, p. 15).

During this period, Wenzell also talked by telephone to the sponsors or members of their staff on at least 13 and possibly 15 occasions (Fs. 48, 58, 60, 61, 83, 88, 92, 94, 104, R. 72, 77, 79, 94, 99, 105).

3. ***Wenzell's participation in the analysis and submission of the sponsors' estimates and proposals.*** The sponsors submitted tentative drafts of their two proposals to the AEC and the Budget Bureau before submitting their formal offers. Wenzell participated in meetings with the AEC and the Budget Bureau

at which tentative drafts of the first and second proposals, and the final version of the first proposal, were analyzed and reviewed. The sponsors were present at some of these meetings (see *supra*, pp. 12–13). In addition, Wenzell was consulted in intra-government meetings on March 1 (when he brought an officer of First Boston, Powell Robinson, with him) (F. 74, R. 89); March 2 (F. 75, R. 89); March 9 and 11, when a joint AEC–TVA analysis of the first proposal was reviewed (F. 84, R. 94, 96); and April 3, when the revised cost estimates for the second proposal were reviewed (F. 97, R. 100). During the meeting on March 1, Wenzell took the position that the cost estimates underlying the sponsors' first proposal were too high (F. 74, R. 89). At the March 9th meeting, Wenzell was asked to talk to the sponsors' representative to determine whether they would submit a better proposal (F. 84, R. 94).

In the course of a discussion with Budget Director Dodge on March 9, Wenzell stated that he did not feel qualified to advise on the matter of over-all-costs. He recommended that the Budget Bureau obtain for this purpose the services of Francis L. Adams of the Federal Power Commission (F. 85, R. 95). In the Government-sponsors' meeting of March 16, he reiterated this suggestion in response to the sponsors' request for an independent analysis of their first proposal (F. 89, R. 97–98). Adams was retained for this purpose by the Budget Bureau on March 19 (F. 91, R. 99), and played a significant role in the rejection of the first proposal and the recommendation that the second pro-

posal be accepted as a basis for negotiation (Fs. 91, 93, 96, 100, 102, R. 99, 100, 103).

At the April 3rd meeting (*supra*, pp. 13, 14), as a result of Adams' analysis, it was agreed that the revised cost estimates were better than those of the first proposal but that further refinement of the figures was required; and the Dixon-Yates group were told that, if they could submit a new proposal close to the revised cost estimates, the Budget Bureau would feel that it deserved serious consideration; Dixon and Yates agreed to outline such a proposal (F. 97, R. 100). Later that day, Wenzell was told by the General Manager of the AEC that the sponsors had come close to submitting acceptable figures, and it was suggested that Wenzell encourage them to refine their figures and present a new proposal (F. 98, R. 101).

4. *Wenzell's financial advice to the sponsors while a Government consultant.* In accordance with his understanding of his instructions from Assistant Director Hughes, Wenzell met with members of Dixon's staff on January 27, 1954, and told them that he was at their service as a representative of the Budget Bureau on the matter of the cost of money needed to finance the plan. As already indicated, such costs played an important part in the total cost of the project and the price at which the energy could be produced and sold (Fs. 55, 67, R. 76, 84).

On February 5, in response to a request by Dixon for a "personal favor" (F. 57, R. 77), Wenzell consulted with the staff of First Boston on the matter of interest costs for the construction of a plant similar

to the Ohio Valley Electric Company (*supra,* pp. 4, 10), using three different hypothetical forms of capitalization (F. 58, R. 77). He reported this information to both Dixon and Assistant Director Hughes (Fs. 58, 59, R. 77). At Hughes' request, he met again with the First Boston staff on February 10, and obtained further information on the basis of a different hypothetical situation (Fs. 59, 60, R. 77, 78). Again, the information was made available to both Hughes and Dixon (Fs. 60, 61, R. 79).

The tentative proposal shown by the sponsors to the Government on February 23 contained a provision that the sponsors

> * * * have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation.

This statement was based on Wenzell's advice to Dixon as to First Boston's opinion on financing costs (F. 67, R. 83). At the same meeting, Wenzell also showed Dixon and Hughes a draft of an opinion-letter he had prepared, typed on a First Boston letterhead, to be sent by First Boston to Dixon, stating that debt securities for the project could be sold at an interest cost of $3\frac{1}{2}\%$ (F. 67, R. 82–83).

At Dixon's request, Wenzell arranged a meeting for him on March 10 with the Chairman of First Boston's Finance Committee for the purpose of obtaining a confirmation of the oral opinion Wenzell had given

him. Wenzell was present at this meeting (F. 86, R. 96).

The second proposal prepared by the sponsors contained a provision on interest costs substantially the same as the provision contained in the draft proposal shown to the Government in February. Prior to final submission of the second proposal to the Government on April 12, this interest cost provision was made known to Wenzell by the sponsors. He knew that it was based upon the information he had obtained for them from First Boston (F. 104, R. 105). On April 10, he again confirmed to Dixon that in First Boston's opinion, the interest for the project should be 3½% (F. 104, R. 106).

5. *Wenzell's advice to the sponsors upon completion of his service as a Government consultant.* The morning of the day that the second proposal was submitted to the Government, April 12, Wenzell again met with the sponsors and the staff of First Boston for a formal confirmation of the oral opinion on interest rates which he had given to Dixon on April 10 (F. 107, R. 106). Wenzell considered that by April 10 his Government service had been finished and that he was working solely in the interest of First Boston (F. 107, R. 107). On April 14, First Boston delivered to Dixon a letter signed by the Chairman of its Finance Committee, giving a written confirmation of the information which Wenzell had furnished the sponsors. This letter was based upon a draft of the First Boston letter Wenzell had prepared and shown to Dixon and to Assistant Director Hughes in February (while he was concededly a Government con-

sultant (Fs. 67, 109, R. 82, 108). Between April 15 and May 18, 1954, Wenzell had a series of conversations with members of the sponsors' staff and of the First Boston staff concerning the project (Fs. 110, 112, 114, R. 109, 110, 111–112). He resigned from First Boston on June 1, 1955 (F. 125, R. 117).

C. THE SPONSORS' AND FIRST BOSTON'S CONCERN OVER WENZELL'S DUAL STATUS

In February 1954, during Wenzell's activity as a Government representative, Dixon's counsel expressed concern over Wenzell's status. He told Dixon that, if it became necessary to finance the project, First Boston would receive first consideration for the financial agency because of its experience in the financing of the Ohio Valley Electric Company (*supra*, pp. 4, 10). The lawyer thought that in view of the public-versus-private power implications of the project, a difficult situation might arise out of Wenzell's governmental activities if First Boston became financial agent for the sponsors. He did not consider that a conflict of interest was involved but thought the sponsors could not afford a situation where the opposition might make it appear that there was a taint of illegality. He told Dixon that Wenzell should discuss his situation with the Bureau of the Budget and with counsel (F. 68, R. 84).

On February 23, Dixon spoke about the matter to Wenzell (F. 68, R. 84). The same day, Wenzell discussed his role with Assistant Director Hughes (F. 69, R. 85). He told Hughes that First Boston was the source of the information in the draft interest opinion he had shown to Dixon (*supra*, p. 16), and

that the sponsors could use the draft as a moral commitment by First Boston to arrange for financing at the interest rates stated. He pointed out that it could be charged that he, as a First Boston officer and consultant to the Budget Bureau, had improperly used his position to obtain business for First Boston. Although Wenzell spoke to Hughes about embarrassment to the Administration, he was chiefly concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well. Hughes said Wenzell was exaggerating the matter, but suggested that he report to his principals in First Boston and explore the matter with counsel (F. 69, R. 85). The same night (February 23), Wenzell went over the matter with the President of First Boston, who felt that he should discuss his status with First Boston's counsel, Sullivan & Cromwell (F. 70, R. 86).

Three days later (February 26), Wenzell conferred with counsel. Arthur Dean, who usually handled First Boston matters, was away, and Wenzell spoke instead to Mr. Raben (Fs. 70, 72, R. 86, 87). He showed Raben a copy of the sponsors' proposal, and the First Boston opinion-letter he had drafted (*supra*, p. 16). Raben advised him (F. 72, R. 87): (1) To resign forthwith and in writing; (2) should the proposal be accepted and should First Boston become the financial agent, then it should consider whether it wished to accept the business, and, if so, whether it should charge a fee; (3) finally, to keep Bureau Director Dodge and Assistant Director Hughes fully informed about any developments, including any

decisions which First Boston might later make as to handling the project.

By telephone, Arthur Dean told Raben that he concurred in this advice. Dean saw the matter as a question of policy rather than a conflict of interest (F. 72, R. 87). The following day, Dean informed counsel for Dixon that he was working on Wenzell's problem. He later told the President of First Boston that Wenzell had been advised to resign (F. 78, R. 92), and the latter assumed that Wenzell would follow this advice (F. 78). Later in the same week, Dixon told his counsel that Wenzell had been advised by First Boston's counsel to resign at once (F. 78, R. 92).

On March 3, Raben learned that Wenzell had not resigned. Dean talked to Wenzell by telephone and told him to resign promptly and in writing (F. 79, R. 92). A week later, Raben learned in a telephone conversation with Wenzell that he had not yet resigned, but assumed from Wenzell's comments that he was about to do so. He, therefore, took no further action in the matter (F. 79, R. 92).

On March 9, Wenzell called upon Budget Bureau Director Dodge. Among other things, he expressed his concern that, if the project were launched, First Boston might be barred from participating in the financing because of his employment as a consultant to the Bureau. Dodge thought that there would be a long period of negotiations and preliminary approvals before the question of financing would arise. He told Wenzell, however, that, if it was likely that First Boston might participate in the project, Wenzell

should finish up his work for the Bureau as soon as possible. Wenzell promised to submit to the Bureau of the Budget for its prior approval any question of compensation or publicity regarding financing for the project which involved his company (F. 85, R. 95). See *infra*, pp. 23-25.

Sometime in March, Dixon and his counsel met with Assistant Director Hughes. During the discussion, counsel for Dixon raised with Hughes the question of Wenzell's dual status. Hughes made no comment on the matter (F. 78, R. 92).

Wenzell never submitted a formal resignation and he continued to participate in the development of the project until early April (F. 72, R. 88). See *supra*, pp. 9, 12–18.[5]

D. WENZELL'S RELATIONS WITH FIRST BOSTON DURING HIS GOVERNMENT EMPLOYMENT

As already indicated, Wenzell had continuous relations with First Boston, with respect to this project, during his period of Government employment.[6] On

---

[5] Although Budget Bureau officials were aware of Wenzell's relationship to First Boston at the same time that he was a Government representative, no representative of the AEC knew before December 1954 that Wenzell, while serving as a Budget Bureau consultant, had been meeting with and supplying information regarding the project to the sponsors, or the extent to which the sponsors were aware of Wenzell's activities in that regard (F. 126, R. 117).

[6] In the Fall of 1953, after the completion of Wenzell's earlier work for the Budget Bureau (*supra*, p. 10), he allowed Chairman Woods of First Boston to read his report to the Bureau although he had been told it was a confidential document and should not be shown; no one in the Bureau gave permission for Woods to see the report (F. 35, R. 63).

all of his visits to the AEC he registered as from First Boston, and gave that firm's address as his own (Fs. 47, 49, R. 71, 72). He brought Miller, a First Boston representative, to Washington in January at the outset of his service, and Miller sat in at the important early meeting on January 20th (*supra*, pp. 6, 11)[7]; Wenzell discussed the project with Miller from time to time in January, February, and March 1954 (F. 108, R. 107). At Dixon's request, Wenzell ascertained First Boston's opinion on the money costs (*supra*, pp. 15–16), and shortly thereafter consulted again with First Boston on this matter (*supra*, pp. 16–17). On February 23, 1954, he drafted an opinion letter on money costs, typed on First Boston stationery, which was shown to Dixon and the Government and which embodied the information he had received from his firm (*supra*, p. 16). To the March 1st meeting to discuss the sponsors' proposal of February 25th, he brought Powell Robinson, another First Boston representative (*supra*, p. 14). He arranged a meeting for Dixon with Linsley of First Boston (F. 86, R. 96). He discussed his relationship with First Boston, as affecting that firm's obtaining of the financing, with Assistant Budget Bureau Director Hughes and Director Dodge, as well as with counsel and First Boston officers (*supra*, pp. 18–21). The court

[7] Miller, together with Linsley (Chairman of First Boston's Finance Committee), handled First Boston's relations with respondent in the weeks following termination of Wenzell's Government service (F. 107, 109, 110, 112, 114, R. 106, 107, 109, 110, 111). They were later assigned full responsibility for First Boston's share in arranging financing for respondents (F. 115, R. 113).

below has found that in his discussions with Hughes, Wenzell "was concerned that he might be getting into a position of duality which could be embarrassing to him and to First Boston as well" (F. 69, R. 85). And, although the Government was to pay Wenzell's transportation expenses and subsistence allowance (*supra,* p. 11), most of the bills were actually submitted to First Boston and paid by it (F. 99, R. 101–102).

E. RETENTION OF FIRST BOSTON BY THE SPONSORS AND THE DECISION AS TO ITS FEE

In February 1954, Dixon asked his assistant to obtain information on the debt financing of a project similar to the Ohio Valley Electric Company (*supra,* pp. 4, 10). Information obtained from financial sources other than First Boston indicated that the financing could be obtained at 3½% (F. 62, R. 79). In April, shortly before submission of the second proposal to the Government, Dixon again had his assistant check on the availability and cost of borrowed money for the project (F. 101, R. 103). Wenzell's obtaining of such information for Dixon-Yates from First Boston has already been described (*supra,* pp. 15–18). At the conclusion of the meeting at First Boston on April 12 (*supra,* p. 17), in which the information Wenzell had furnished him was confirmed, Dixon believed that he ~~had~~ retained First Boston as financial agent (F. 116, R. 113). Wenzell also expected by that date, two days after he considered his Government service to have ended, that First Boston would be financial agent if a contract resulted from the sponsors' proposal (F. 108, R. 107).

In late April, representatives of Lehman Brothers, an investment banking firm, approached Dixon's staff in an effort to have their firm considered in connection with the financing of the project (F. 111, R. 110). Dixon thought their participation might be desirable and he suggested this to First Boston (Fs. 111–112, R. 110–111). That firm was not pleased at the idea and, after first offering to withdraw, indicated that it would participate only if it occupied the senior position in the transaction (F. 113, R. 111). Dixon advised First Boston on May 12 that the sponsors wished both firms to participate in the financing; First Boston was to have the dominant position, a matter of importance in the financial community (F. 113, R. 111). Chairman Woods of the Board of Directors of First Boston felt that if the financing was successful the accomplishment would be valuable advertising for First Boston and add to its experience; the advertising might lead to other business of the same kind (F. 113, R. 111). No formal agreement was ever executed, but all questions of the financial agency were settled by May 12 (F. 116, R. 113).

Chairman Woods believed that the financing which the firm had been retained to handle flowed directly from his offer of Wenzell's service to Bureau Director Dodge in May 1953 (F. 117, R. 114). Partly for that reason, he decided that First Boston should not charge a fee, and after some discussion this decision was confirmed by a resolution of the firm's executive committee on October 21, 1954 (F. 117, R. 114). The decision, unprecedented in the firm's history (F. 123, R. 116), was first indicated to the sponsors' staff and

to Lehman Brothers in a meeting on November 17, 1954, six days after the formal contract with AEC was signed (F. 118, R. 114). The matter was not settled, however, at that time (F. 118, R. 115). Dixon, who was informed of the meeting, did not understand that First Boston had made a final decision to charge no fee (F. 121, R. 115).

On February 19, 1955, following a speech by a Senator criticizing First Boston and Wenzell, the firm issued a press release stating that Wenzell had served the Government without compensation; and that it was not charging a fee for its services to the sponsors (F. 120, R. 115). The following May, Dixon asked for a clear statement of First Boston's position and, on the advice of its counsel, First Boston sent him a letter confirming that it wished no fee for its services (F. 121, R. 116), a decision which surprised Dixon (F. 123, R. 116). Shortly thereafter, Lehman Brothers decided that, in view of First Boston's decision, it would charge no fee (F. 122, R. 116).

The Budget Bureau was never informed by Wenzell or any other representatives of First Boston that First Boston had been retained as financial agent (F. 127, R. 117–118) and did not learn this fact until February 18, 1955 (F. 127, R. 117–118). See *supra*, p. 21.

III

PROCEEDINGS IN THE COURT OF CLAIMS

Following the AEC's declaration that the contract was not valid (*supra*, p. 3), respondent filed a peti-

tion in the Court of Claims on behalf of itself and for the use of twenty-four other parties to recover expenses and damages under the contract (R. 49). The United States defended on the ground that the contract was invalid because Adolph Wenzell's activities constituted a violation of the policy against conflicts-of-interest expressed in 18 U.S.C. 434 (*supra*, p. 2); and on five other grounds [8] (R. 47).

After a trial, the Court of Claims held that respondent was entitled to recover (R. 1-46). The majority of the court rejected all of the Government's defenses including that of conflict-of-interest (R. 1-31). Mr. Justice Reed and Chief Judge Jones dissented as to that defense (R. 31-46).

The majority held that Wenzell's activities did not constitute a violation of 18 U.S.C. 434 (*supra*, p. 2), since the possibility that his permanent employer, First Boston, might profit as financial agent if the proposal he was working on for the Government ripened into a contract was too remote to give him a

---

[8] The other defenses were:

(*a*) That the Atomic Energy Commission was not authorized by the Atomic Energy Act of 1954 to make the contract.

(*b*) That the contract was not placed before the Joint Committee on Atomic Energy in the manner required by the Atomic Energy Act.

(*c*) That financing agreements required by the contract violated the Public Utility Holding Act of 1935.

(*d*) That plaintiff did not obtain all of the regulatory approvals required for it to arrange the financing necessary for performance of the contract.

(*e*) That the power contract was void for lack of mutuality.

present interest in the contract the Government was discussing with Dixon-Yates. Second, the court held it significant that there was no concealment—Wenzell's activities were on the instructions, and with the knowledge and approval, of his superiors in the Budget Bureau. Citing *Muschany* v. *United States*, 324 U.S. 49, the court concluded that Wenzell's activities were not such as to render the contract unenforceable by this respondent against the United States on grounds of public policy.

The dissenting judges believed that Wenzell's activities were a plain violation of the policy expressed by Congress in 18 U.S.C. 434; that the knowledge and actions of Budget Bureau officials cannot waive the rule laid down by Congress; and that, since the contract resulted from negotiations which violated the statute, it is invalid as against an expressly defined public policy.

SUMMARY OF ARGUMENT

I

Wenzell's participation in the dealings between the United States and the Dixon-Yates' group, respondents' organizers and sponsors, contravened 18 U.S.C. 434.

A. Both public policy and sound morals forbid a Government representative to have either a direct or an indirect interest in any bid or contract with the United States. The public policy is statutorily expressed in 18 U.S.C. 434 which flatly prohibits the participation in any business transaction on behalf of the United States, of any person who has a direct

or indirect interest in the profits or contracts of the business entity with which he is dealing. This statute is comprehensive, across-the-board, and objective in its operation. Its purpose is to protect the United States not only from actual corruption, but also from any tendency toward corruption, as well as from the unconscious impairment of impartial judgment which may overtake even men of the best intentions when their personal business interests are affected by their actions on behalf of the Government.

B. Adolphe H. Wenzell's activities fell within the letter and spirit of 18 U.S.C. 434. This is conclusively reflected in the chronicle of his activities as recorded in the findings of the court below.

1. The "business transaction" in which he participated for the United States was the development of a proposal which would furnish an acceptable basis for a contract to supply the United States with electric power. In numerous contacts with respondent's organizers, and in intra-governmental conferences, he not only acted on financial matters, but on the overall cost of the project. That these negotiations were preliminary and necessarily tentative does not make the statute inapplicable. The proposal which issued from the transactions in which Wenzell significantly participated formed the keystone of the later negotiations for a formal contract; there was no wall of separation between proposal and formal contract. For the same reason, Wenzell's non-participation in the further negotiation of the formal contract makes no difference. The statute's terms clearly apply during preliminary negotiations, which are of vital impor-

tance to the later agreement, as well as at the time when the formal contract is consummated. Otherwise, interested Government representatives could exert significant influence over the transaction in which they were participating, and yet escape responsibility under the statute by resigning before the final contract was signed. The fact that Wenzell was not a nominal contracting agent of the United States is also without significance. Anyone on a negotiating staff who may have an influence in determining whether an agreement is reached, and what its contents are, comes within the statutory scheme.

2. Wenzell was personally interested in the contract which the United States was seeking with respondent's sponsors. He acquired this interest through his employer, the First Boston Corporation, which, at the time of Wenzell's participation, stood to gain substantial profit and prestige from the transaction as the probable financial agent for respondent. Wenzell's activities continually kept his company to the forefront of the negotiations so that by the "logic of circumstances" (R. 16) it stood to receive the financial agency for the project and was, in fact, retained for this purpose long before the formal contract between the United States and respondent was negotiated.

Since 18 U.S.C. 434 is a flat, preventive, objective prohibition, it is irrelevant that no corrupt acts were proved against Wenzell; that the final contract turned out to be a fair one; that Wenzell did not believe there was a conflict-of-interest; or that his desire to have the project built by private enterprise accorded with Government policy. For it is clear that under

the statute it need not be proved that corrupt acts actually occured; that they might have occurred is sufficient. The purpose of the Act is to remove even the shadow of a doubt as to the integrity of Government contracts. Impairment of impartial judgment as a result of private interests may be unconscious as well as the result of dishonest intentions; thus, subjective attitudes do not waive violation of the objective standards of behavior Congress laid down in 18 U.S.C. 434. The fact that both Wenzell and the Government desired a contract of this general nature does not remove the conflict, since it is always the ultimate goal of one with an interest in a prospective Government contract to advance that interest by making that contract binding on the Government. His private interest may nevertheless affect his judgment and his conduct with respect to the content and terms of the agreement.

II

Wenzell's conduct was not exempted from 18 U.S.C. 434 by the fact that his superiors in the Bureau of the Budget were aware of his dual role. The statute imposed the disqualification on Wenzell, and did not empower either his superiors or his employer to decide otherwise. Nor were Budget Bureau officials authorized by Congress to exempt anyone from the conflict-of-interest laws. What they were powerless to do directly could not be accomplished indirectly by acquiescence in, or condonation of Wenzell's conduct, or ignorance of the fact that it was in violation of the law. Section 434 was designed by Congress to protect

the United States as a government from the mistakes (as well as the connivance) of its own officers and agents.

III

The contract which issued from the transactions in which Wenzell participated is unenforceable under the policy of 18 U.S.C. 434. The question in this case is not whether the contract was good or bad, but whether it was formed in the atmosphere of absolute single-mindedness which it is the purpose of 18 U.S.C. 434 to guarantee. Guided by this purpose, the law's concern is not whether the party formally contracting with the Government is guilty or innocent of wrongdoing, but whether the bargain is tainted by a prohibited interest on the part of the Government representatives. If so infected, it is not to be enforced by the courts of the United States.

A. It is well established that a contract in violation of a prohibitory statute is unenforceable; and, in particular, there are many cases in which public contracts were held unenforceable against the public entity which made them, because, as in this case, a Government representative had a direct or indirect interest in the agreement in violation of a statute prohibiting such an interest.

The express contract here is unenforceable because, as we have shown, when the basic proposal was being developed, the United States was unlawfully represented by one having a private interest in the transaction which disqualified him from serving the United States with undivided loyalty. Under the statute there is no need to show actual corruption, fraud,

dishonesty, or loss to the Government. Existence of an indirect influence on the public representative through his private economic interest is all that is necessary to void the agreement. Congress has condemned such conduct as being so dangerous to the public interest that the contract is unenforceable regardless of the actual effect in a particular case. What the contract might have been had Wenzell not participated in the transaction can never be known; his action in violation of the statute renders it so suspect that it cannot be enforced if the statutory policy is to be maintained.

In some cases, although an express contract may be unenforceable because infected by a conflict-of-interest, recovery *quantum valebat* as on an implied contract may be available to a plaintiff who was wholly innocent of complicity in the unlawful activities of the Government representative. In this case, however, this Court need not consider this problem (even assuming respondent's innocence, which we dispute) since the United States received nothing of value from respondent. The only basis upon which it can recover, therefore, is under the terms of the express contract which was tainted by Wenzell's interest in the transaction.

B. In our view, as we have just indicated, the contract is unenforceable whether or not the respondent contributed in any way to violation of 18 U.S.C. 434 by Wenzell. But on this record it is also clear that respondent's sponsors, who were fully aware of the conflict problem, did not take the simple and reasonable steps necessary to remove the conflict by

destroying the basis for Wenzell's private interest in the contract. They could have done this by advising him, and First Boston, that First Boston would not be considered as financial agent for the project if he participated in the transaction. Instead of taking this simple but effective step, the Dixon-Yates group contented itself with ineffective expressions of concern over Wenzell's dual-interest, and continued to deal both with him and with First Boston.

C. Refusal of enforcement is an effective remedy for protection of the United States. It will spur both contractors and Government officials to greater efforts to guard against conflicts-of-interests. On the other hand, refusal to apply the traditional sanction of non-enforcement will lead to acquiescence in conflicts because there will be no practical consequences about which the contractor need be concerned. And, since the business community has the same vital interests as other segments of the public in the integrity of the federal contracting process, non-enforcement will not deter contractors from dealing with the United States or make it more difficult for the United States to obtain expert consultants from private life.

It is universally recognized that the federal contracting process demands the highest standards of integrity and fidelity. Enforcement of tainted contracts would undermine those standards and, in a larger sense, weaken the moral standards of the Nation at large. For these reasons, this contract, which from its originating proposal was infected by Wenzell's conflict-of-interest in violation of an express congres-

sional policy intended to avoid such a conflict, cannot be enforced.

ARGUMENT

The formal contract upon which respondent seeks recovery is the direct product of a proposal developed in negotiations between the United States and respondent's organizers, the Dixon-Yates group. A significant role for the United States in the transactions in which this proposal was developed was played by Adolphe H. Wenzell. Both respondent's organizers and Wenzell knew that Wenzell's private employer (First Boston), for whom he continued to work during the time he was acting for the Government, was the most likely candidate to be financial agent for respondent's activities, if a proposal acceptable to the Government could be developed by the Dixon-Yates group. Thus, Wenzell had a clear private interest in the transactions between Dixon-Yates and the Government. Under the terms of 18 U.S.C. 434, *supra*, p. 2, he should have been disqualified from these transactions because of his private interest, but this conflict of interest was not removed; his participation rendered unenforceable the contract which ensued. We shall show, *first*, that Wenzell's direct financial interest in Dixon-Yates's probable subcontractor (First Boston) was not too remote to come within the statute's coverage of all "direct or indirect" adverse pecuniary interests; *second*, that his government supervisors' knowledge of Wenzell's conflict-of-interest did not free the transaction from the impact of the statute; and, *third*, that the traditional sanction of non-enforcement of a contract resulting

from tainted negotiations should be applied here against respondent.

I

WENZELL'S PARTICIPATION IN THE TRANSACTIONS BETWEEN THE UNITED STATES AND THE DIXON-YATES GROUP, RESPONDENT'S ORGANIZERS, CONTRAVENED 18 U.S.C. 434

A. THE PURPOSE OF 18 U.S.C. 434 IS TO PROTECT THE UNITED STATES FROM THE CORRUPTING TENDENCIES WHICH ALIEN ECONOMIC INTERESTS MAY EXERT UPON ITS REPRESENTATIVES

Public policy and sound morals forbid a government representative to have a personal economic interest in any bid or contract with the United States, lest he be tempted to advance that interest at the expense of the Government. *Crocker* v. *United States*, 240 U.S. 74, 80. The moral principle comes from the ancient teaching that no man can serve two masters, particularly when one of those masters is his own economic interest. Matt. vi, 24. The public policy is expressed in an Act of Congress, 18 U.S.C. 434,[9] *supra*,

[9] Section 434 is one of seven statutes embodying the federal conflict-of-interest laws. All but one of these statutes (5 U.S.C. 99) is contained in the criminal code, Title 18, U.S. Code. Section 216 prohibits the receipt of anything of value by a Government agent or member of Congress for procuring a contract with the United States; it also prohibits the offer of anything of value for this purpose. Section 281 prohibits federal officers and employees, and members of Congress, from receiving directly or indirectly any compensation for services in connection with any claim, contract or proceeding in which the United States is directly or indirectly interested. Section 283 prohibits federal officers and employees, and members of Congress from prosecuting any claim against the United States. Section 284 disqualifies employees of the United States from prosecuting claims in matters connected with their former duties for two

p. 2, which lays down a flat prohibition against official participation of any person acting for the United States in transactions with any business entity in the profits or contracts of which he has a direct or indirect interest. As was observed of a related conflict-of-interest statute: "The very comprehensiveness of the language used in every line of the section shows * * * a special effort on the part of Congress to make the

---

years after separation; Section 1914 prohibits any private payment to an employee in connection with his services as a Government employee. In slightly narrower terms than 18 U.S.C. 284, 5 U.S.C. 99, R.S. 190, disqualifies former officers or employees from prosecuting claims which were pending in their former departments, for two years after separation.

Implementation of the policies underlying the conflict-of-interest laws has been the subject of continuing congressional concern. See *Ethical Standards in Government*, Report of a Subcommittee of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. (1951); *Compilation of Certain Memoranda, Prepared by the Office of the Senate Legislative Counsel on Conflict of Interest Statutes*, Senate Committee on Armed Services, 84th Cong., 1st Sess. (1955); *Federal Conflict of Interest Legislation*, a Staff Report to Subcommittee No. 5, House Committee on the Judiciary, Pts. I–V, 85th Cong., 2d Sess., (1958); *Federal Conflict of Interest Legislation*, Hearings before the Antitrust Subcommittee, House Committee on the Judiciary, 86th Cong., 2d Sess.

Private studies have also been undertaken. Dembling and Forrest, *Government Service and Private Compensation*, 20 G.W.L. Rev. 174. McElwain and Vorenberg, *The Federal Conflict of Interest Statutes*, 65 Harv. L. Rev. 955; Davis, *The Federal Conflict of Interest Laws*, 54 Col. L. Rev. 893 (1954); Special Committee on Federal Conflict of Interest Laws of the Assn. of the Bar of the City of New York, *Conflict of Interest and Federal Service* (1960).

Although many bills proposing changes in the conflict of interest laws have been introduced in Congress in recent years, none as yet has been passed. *Federal Conflict of Interest Legislation*, a Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong., 2d Sess. (Pts. III–V) pp. 3–30;

remedy here as broad as the evil.'' 40 Op. A.G. 294, 300.

Section 434 does not forbid federal officials and employees (*i.e.*, those who may act for the United States) from having private business interests—it assumes them. *Federal Conflict of Interest Legislation*, a Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong., 2d Sess. (Pts. I and II), p. 42. Nor does the statute attempt to compel the official to put his private interest out of his conscious and subconscious mind. What it does is unequivocally forbid any person acting as a representative of the Government in its dealings with private business from so acting whenever his private business interests touch the transaction in which he is representing the Government. The prohibition is expressed in terms of an objective standard of behavior; it is comprehensively stated in across-the-board terms; and it is intended to be preventive of tendencies toward corruption and partiality, not a *post facto* cure. It does not depend on the subjective feelings of the Government representative, or his individual capacity or willingness to subordinate his personal interests to those of the Government. This long standing congressional policy expressed in the statute has been summarized thus (*Ethical Standards in Government*, Report of a Subcommittee of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess., p. 48):

> If the spirit of this law is obeyed along with the letter, it would mean the disqualification of any public official acting officially in matters

which affect their personal economic interest. Such is the approved practice of judges. This is a case where the final answer to the problem must be the development of a tradition of obeying the spirit of the law as well as the letter of it.

This flat preventive rule of disqualification has a simple and obvious purpose: "the protection of the United States in transactions between it and corporations [as well as other businesses] and to prevent its action from being influenced by anyone interested adversely to it." *United States* v. *Chemical Foundation,* 272 U.S. 1, 18. The circumstances of its original enactment in 1863, and its continuation without substantial change down to the present day, reflect an enduring congressional recognition that the United States needs immunization from the injurious possibilities which may arise when private profit and public duty become intermingled.[10]

[10] 18 U.S.C. 434 is a restatement of a statute enacted following the disclosure of shocking dishonesty in connection with the procurement of federal military supplies during the Civil War. Section 8, Act of March 2, 1863, 12 Stat. 696, 698. See H. Rep. No. 2, 37th Cong., 2d Sess., *Government Contracts* and Appendix. It was added, as an amendment from the floor of the Senate (62 Cong. Globe 954), to the bill (S. 467, 37th Cong.) which became the False Claims Act. 12 Stat. 696, 698. The broad prohibition against Government representatives being "directly or indirectly interested in the pecuniary profits or contracts" of businesses with which they deal was included in the original bill and has been continued by the Congress without change through the various reenactments of the statute. R.S. 1783; Section 41, Act of March 4, 1909, 35 Stat. 1097, 18 U.S.C. 93 (1940 ed.); Act of June 25, 1948, 62 Stat. 703.

It was not conscious corruption alone which Congress was seeking to prevent, but that impairment of impartial judgment which can overtake the best-intentioned of men when their personal financial interests may be affected by their actions on behalf of the Government. Cf. *Waskey* v. *Hammer,* 223 U.S. 85, 93. "No matter how high are the motives of the * * * officer who advises, he is likely as a realistic matter to be consciously or unconsciously influenced by the fact that his actions may benefit the corporation of which he is an officer and a stockholder * * *" 40 Op. A.G. 168, 169. "If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large" (*Stockton Plumbing & Supply Co.* v. *Wheeler,* 68 Cal. App. 592, 602, 229 P. 1020, 1024 (state conflict-of-interest statute)).

This view of Section 434's broad purpose was applied in *Rankin* v. *United States,* 98 C. Cls. 357. Rankin, a local Director of the Works Progress Administration, arranged to have the local WPA offices placed in space leased by his private architectural firm. No formal lease or sub-lease for the space was ever executed. On behalf of the firm, Rankin later sued the United States under a theory of implied contract to recover the reasonable value of the premises for the period they were occupied by the WPA.

Although he had fully disclosed the interest of his firm to his superior, the Court of Claims held that Rankin had violated the predecessor of 18 U.S.C. 434. This violation would have foreclosed recovery upon an express contract, and it therefore barred recovery upon an implied contract to pay the reasonable value of the premises. The underlying basis for the decision was disclosed in a quotation the court chose from its earlier ruling in *Michigan Steel Box Co.* v. *United States*, 49 C. Cls. 421, 439 (98 C. Cls. 357, 367):

> The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them.[11]

---

[11] In *Architects Building Corporation* v. *United States*, 98 C. Cls. 368, a companion case, further effects of Mr. Rankin's private interests were considered. He was also president, and a stockholder, of Architects Building Corporation which owned the building in which the WPA's local offices were situated. The arrangements for use of the space were negotiated by a rental agent who was Rankin's subordinate. No lease was ever executed, and the corporation was not paid by the Government for use of the space. It sued for the reasonable value of the premises on a theory of implied contract. It was found that Rankin had no actual connection with the negotiations although he would have signed the lease, as president of

It was a similar recognition of the dominating force of economic self-interest, despite man's best efforts to neutralize it, which led this Court, independently of any act of Congress, to condemn contingent fees for the procurement of Government contracts. Such agreements tend to introduce corrupting influences into transactions for the procurement of supplies and services, and that tendency embodies their vice. "The objection to them rests in their tendency, not in what was done in the particular case." *Hazelton* v. *Sheckells,* 202 U.S. 71, 79; *Tool Co.* v. *Norris,* 2 Wall. 45, 55; *Oscanyan* v. *Arms Co.,* 103 U.S. 261, 275. The same baneful tendencies are present when a Government representative has a private interest in a contract or bid in connection with which he is acting

---

the corporation, had one been executed. The Court of Claims divided 3-2 on the question of whether Rankin's interest would defeat the corporation's claim for the space used by the WPA. The majority held that his connection with the transaction was so slight and minor that it could not affect the interests of the Government. The dissenters believed that his position as nominal superior of the agent who arranged the use of the space was sufficient to invalidate the transaction under the statute here involved.

In line with the *Architects Building* case, the Attorney General recently held in an opinion that ultimate official responsibility for procurement activities of a department does not constitute the "transaction of business" within the meaning of 18 U.S.C. 434. In the same opinion, however, he cautioned that *individual action* respecting such procurement could bring an official within the statute. The opinion, unreported as yet, appears in *Nomination of Neil H. McElroy,* Hearing before the Senate Committee on Armed Services, 85th Cong., 1st Sess., pp. 12-14.

Since Wenzell was personally involved in the transactions in question here, the *Architects Building* case has no application.

for the Government. See, *e.g., Pan American Co.* v. *United States,* 273 U.S. 456, 500; *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 53; *Crocker* v. *United States,* 240 U.S. 74, 80, 81; *United States* v. *Carter,* 217 U.S. 286. To protect the United States from these tendencies, Congress adopted the comprehensive prohibition of Section 434; that prohibition operates whenever the objective facts of dual interest appear, and does not depend on the presence of bad faith or actual corruption. It applies to honorable as well as dishonorable men.

B. WENZELL'S ACTIVITIES FELL WITHIN THE LETTER AND THE SPIRIT OF 18 U.S.C. 434

1. *Wenzell acted as an officer or agent of the United States for the transaction of business with respondent's organizers (the Dixon-Yates group)*

(*a*). Section 434 is not confined to persons who may be technically officers or employees of the United States. Compare *United States* v. *Germaine,* 99 U.S. 508, with *Steele* v. *United States No. 2,* 267 U.S. 505, 507; 40 Op. A.G. 289, 297. It reaches "*whoever* * * * is employed *or acts* as an officer or agent of the United States for the transaction of business * * *" with the business entity involved. 18 U.S.C. 434, *supra,* p. 2. (Emphasis added.) Wenzell was retained by the Bureau of the Budget in January 1954 for the sole purpose of assisting the Government in the negotiations with the Dixon-Yates group. Even the court below recognized that he was retained by the Government to act for the United States in this particular transaction and that he necessarily transacted business for the United States with

respondent's sponsors. The findings make this indisputable. He was retained as an expert consultant for the Budget Bureau and acted as such; he himself informed members of the Dixon-Yates staff that he was at their service as a representative of that agency (F. 55, R. 76).[12] In that capacity, throughout the ten weeks of his participation, he actively transacted business for the Government with the sponsors, in numerous conferences, telephone calls, and conversa-

---

[12] Wenzell was hired by the Budget Bureau under its appropriation for 1954, 67 Stat. 299, to hire consultants by contract under Section 15 of the Administrative Expenses Act of 1946, 60 Stat. 810, as amended, 5 U.S.C. 55a. That authority also extended to service without compensation. 27 Comp. Gen. 194. See H. Rep. No. 2894, 84th Cong., 2d Sess., *Employment and Utilization of Experts and Consultants*, p. 11.

The Federal Government has long employed temporary consultants, agents, and advisers—both with and without compensation—the number varying with the needs of the times. H. Rep. No. 2894, 84th Cong., 2d Sess., *Employment and Utilization of Experts and Consultants;* Dembling and Forrest, *Government Service and Private Compensation*, 20 G.W.L. Rev. 174, 179.

Whether retained with or without compensation, such irregular employees have been considered by the Executive Branch to be subject to the conflict-of-interest statutes. See, *e.g.*, 40 Op. A.G. 289; 40 Op. A.G. 294; 41 Op. A.G. No. 64. The fact that a Government employee may advise in transactions concerning his private employer without being directly connected with procurement activities has been held to make no difference. 40 Op. A.G. 168.

Congress also regards technical consultants to be subject to the conflict-of-interest laws and finds it necessary, in special cases, to grant them exemptions from the operation of these laws. See *e.g.*, Sec. 710(b)(4), Defense Production Act of 1950, 64 Stat. 798, as amended, 50 U.S.C. App., Sec. 2160. No exemption from Section 434 was provided in the Acts under which Wenzell was hired.

tions; in intra-government analyses and supervision of the sponsors' cost estimates; in encouraging them further to refine their figures and submit new estimates; and as a general expediter for the Budget Bureau on this project. He not only acted on financial matters, but on the overall cost of the project. He was a significant Government negotiator, and his activities were on a par with those of the permanent federal employees dealing with the sponsors. See the Statement, *supra*, pp. 10–15.

(*b*). The business then being transacted with the Government by the Dixon-Yates group (the "business entity" which ultimately became the respondent) was the development of a proposal which would furnish an acceptable basis for a contract to supply the United States with electric power. This was no routine or trivial matter.

It was obvious, from the time that discussion of a private power project to relieve the power shortage in the Memphis area began, that the preliminary proposal to be made by the private utilities to the Government would have to be perfected in negotiations between Government representatives and the utilities (*i.e.*, the sponsors). Although the Government was anxious to implement its power policy through a private contract, and had tentatively decided before January 20, 1954, to seek such a contract, there was no firm decision at that time. The President's budget message of January 21 cautioned that if negotiations were not consummated as contemplated, construction of new TVA facilities would be reconsidered (F. 41, R. 68). Some of the AEC members were opposed to the use of that agency as a vehicle for implementing the Government's power policy (Fs. 80, 141, R. 93,

125). Government officials were aware that any higher costs which might result from a contract utilizing the AEC would have to be justified on the basis of some overall advantage to the United States. Thus, even after development of a proposal by the Dixon-Yates group had been underway for six weeks, the AEC on March 3, 1954, informed the Bureau of the Budget that either the President or Congress would have to determine the course of action which would be in the best interests of the Government (F. 80, R. 93). The proposal from the sponsors which was to be laid before these higher authorities would plainly have to be the best which the Government believed it could obtain.

Because of such reservations and the large sum involved, the proposal being formulated by the Dixon-Yates group was the subject of continuing negotiations between their representatives and the Government. At one stage in these crucial preliminary transactions the sponsors were flatly informed that the cost estimates contained in their proposal were too high to form a basis for serious consideration by the Government (F. 93, R. 99). It was not until a second proposal had been developed, on the basis of further discussions with the Government's representatives (including Wenzell), that the Bureau of the Budget was willing to recommend to the President that the sponsors' offer be made the foundation for negotiation of the formal contract (F. 129, R. 119). In short, the proposal negotiations were not idle palaver but an essential pre-condition to the formal contract.

(*c*). Respondent argues, however, that on the facts found in this case (i) the relationship of the formal

contract to the proposed negotiations (in which Wenzell participated) was too tenuous and remote to warrant considering those negotiations as the "transaction of business" with respondent (within the statute); and (ii) the particular role of Wenzell in those negotiations was too small to call for any consideration at all. The findings and opinion below do not support this appeal to the doctrine of *de minimis.*

The fact that the formal contract under which this suit is brought was consummated after further vigorous and extended negotiation does not dilute the significant effect of the "transaction of business" at the preliminary stages. Although there were many changes and additions to the proposal, the Court of Claims has found that the final contract was "[i]n a general way" within its terms, and those terms were often referred to (F. 134, R. 121); moreover, if there had been no proposal by respondent's sponsors, there would have been no contract at all. Despite the lengthy negotiations, the proposal Wenzell had helped formulate remained the keystone of the ultimate agreement and its terms were crucial to the contract which was finally agreed upon. The proposal formed both framework and guidelines for the contract. There was no Chinese wall of separation between the proposal (and the negotiations leading to it) and the formal contract (and the further negotiations preceding it).

Wenzell's participation in these proposal negotiations was very far from unimportant. As detailed in the Statement, *supra,* pp. 10–18, and summarized *supra,* pp. 42–44, his activities in connection with the

proposal were decidedly significant—particularly in the inquiry into the leading element of money costs, in the general intra-government analyses of Dixon-Yates' cost estimates, in encouraging the sponsors to further refinement of their proposal, and as an expediter for the Budget Bureau. Respondent claims that Wenzell was concerned only with Dixon-Yates' first proposal (Br. in Opp., pp. 17–18), while it was the second proposal which was accepted. But the second proposal was not drawn out of the air. It rested firmly upon the negotiations and analyses of the unsatisfactory first proposal. Wenzell actively participated in the negotiations leading to the first proposal, and in the analysis of that proposal by the Government. He participated also in the meeting of April 3 when new cost estimates for the sponsors' second proposal were discussed with them (F. 97, R. 100). His concern at that time included all of the project costs, not merely the money costs (*supra*, p. 12).[13] On the day the sponsors submitted their second proposal, Wenzell again met with them to advise on financial matters, although he had now changed hats and considered himself to be working solely in the interest of First Boston (F. 107, R. 107). His intimate role in the formulation of the accepted proposal is so clear that the majority below gave him credit for the fact that the final contract was made at all (R. 13).

(*d*). That these transactions in which Wenzell participated were preliminary and necessarily tentative does not for that reason make them any the less "business transactions" within 18 U.S.C. 434. The statute,

[13] There were also numerous telephone conversations (see the Statement, *supra*, p. 13.)

in plain language, broadly covers *all* "transactions of business" by any federal agency with any "business entity"; that phrasing includes the preliminary stages of business dealings as well as the final steps. It could not well be otherwise; the form and substance of the ultimate agreement is most often, as here, the filial product of the earlier course of negotiations. And the impact of such preliminary dealings is particularly significant when, as in this case, they are conducted in closed negotiations with a selected business entity. The broad objectives of the legislation (*supra*, pp. 35–42) would not be fulfilled if preliminary negotiations were excluded from coverage.

It follows that Wenzell's absence from the negotiation of the formal contract, after the proposal in which he participated was accepted as the basis for further negotiation, did not take him out of the statute's reach. As we have indicated, the statute's broad terms apply during the preparatory negotiations which normally mold the final contract.[14] Other-

[14] Arthur Linton Corbin has summarized the significance of preliminary negotiations in these words (1 Corbin, *Contracts*, p. 56):

> Such communications may be incorporated into the offer that is finally accepted; and in any case they form part of the background against which the final expressions of agreement must be interpreted and understood. Even if those final expressions are put in the form of a written document, now often described as a written "integration", purporting to be the final and complete expression of all terms agreed on, a just interpretation of that integration cannot be made without considering the actions and communications of the parties in the preliminary bargaining process. It is the intentions and meanings of the parties

wise, a Government negotiator who had a direct or indirect interest in the very agreement he was negotiating could simply immunize himself from liability by resigning after the initial negotiations but before the final consummation of the contract. It is plain that such forbidden participation during the informal preparatory dealings can easily have lasting consequences reaching to the ultimate product. This was clearly recognized in *Edward E. Gillen Co. v. Milwaukee*, 174 Wis. 362, 183 N.W. 679, which involved a similar state statute. There, the interested public official participated in preliminary arrangements on the contract, but after his role was questioned, and before the formal contract was made, resigned from the private employment which was found to constitute the prohibited interest. When it was argued that this removed the infection, the Supreme Court of Wisconsin answered that the resignation came too late. "If contracts could be thus made and consummated by public officers holding interests adverse to the public after participating in the preliminary proceedings, the statute would be shorn of its usefulness. The taint cannot be so easily removed." 174 Wis. at 372; 183 N.W. at 683.

Nor can Wenzell be said to be free from the statute's reach on the ground that he was not an agent of the United States vested with power to make binding commitments on its behalf. Contracts as substantial as the one involved here are normally developed in

---

that are being "integrated," and it is those meanings and intentions that justice requires the court to determine and make effective.

elaborate negotiations in which the Government is represented, as in this case, by a whole staff who may advise but cannot consent. Like Wenzell, these representatives have a significant influence in determining whether a formal agreement is reached and what its contents are. Thus, in *Rankin* v. *United States*, 98 C. Cls. 357, the Government representative, a W.P.A. official. was held to have violated the statute even though any formal contract would have been made by officials of another agency, the Treasury Department (see *supra*, pp. 39–40; *infra*, pp. 70–71). Even a person merely in an advisory position is affected by the rule. 40 Op. A.G. 168; cf. *Schaefer* v. *Berinstein*, 140 Cal. App. 2d 278, 291, 295 P. 2d 113, 122. The statute would be hamstrung if it were read so as to exclude all of those who transact business for the Government except the nominal contracting officer.

2. Wenzell was directly or indirectly interested in the contracts of respondent

The majority of the Court of Claims recognized Wenzell's significant role in the development of the contract. Indeed, as we have noted, it observed that "[w]hile the [formal] contract contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work" (R. 13). The court also recognized that Wenzell had a direct pecuniary interest in the profits or contracts of his permanent employer, First Boston (as a vice president paid a salary and a bonus). At the time Wenzell was acting for the Government, First Boston was, as a real and practical matter, the most likely candidate for receipt of the valuable financial agency

for the proposed project (R. 14; F. 68, R. 84). Wenzell's efforts materially advanced this likelihood by helping to produce the proposal which was the necessary precondition, as well as by bringing the sponsors and his employer together for financial discussions. Nevertheless, the court below felt that Wenzell's financial interest in the developing project was too remote to constitute even an "indirect" interest in Dixon-Yates contract with the Government. On the facts found by the Court of Claims itself, Mr. Justice Reed and Chief Judge Jones were clearly correct in holding that the majority were giving far too narrow a reading to the statute. Section 434 was designed to reach the kind of indirect economic interest involved here as well as the incentives of direct legal interests.

(*a*). Wenzell was directly and pecuniarily interested in having First Boston obtain the financing of the project; at the time he was acting for the Government, he could expect substantial compensation from his employer if that occurred (F. 125, R. 117). As the Statement shows, *supra*, p. 24, First Boston was anxious to have the business, which it was likely (but not absolutely certain) to receive if the Dixon-Yates group did consummate a contract with the Government; and, of course, it was first of all necessary that a proposal acceptable to the Government as a basis for negotiations be formulated. Accordingly, it was to Wenzell's direct pecuniary advantage (1) that an agreement be reached by Dixon-Yates and the Government on the project, and then (2) that the financing be given by Dixon-Yates to his firm, First Boston. During the negotiations for the proposal, he had a

clear opportunity to advance both objectives, and a clear economic reason to do so. His relation to First Boston, the probable financial agent, gave him at least an "indirect" financial "interest" in the very contract of the Dixon-Yates entity about which he was transacting business.[15]

Wenzell's interest in the Dixon-Yates contract may be assimilated to that which a stockholder and officer of a prospective subcontractor has in the making of a prime contract under which his company is likely to profit. Such a Government representative, pecuniarily interested in a probable subcontractor, necessarily has at least an indirect interest in the contract of the business entity (*i.e.,* the probable prime contractor) with which he is directly negotiating. State courts which have considered the question have held that the interest of a prospective subcontractor constitutes an "indirect interest" sufficient to invalidate a prime contract under similarly worded conflict-of-interest statutes. In *City of Northport* v. *Northport Townsite Co.,* 27 Wash. 543, 546, 68 P. 204, 205, the statute barred municipal officers from being "interested, directly or indirectly, in any contract with [their] city." A city councilman was manager and a

[15] Of course, it makes no difference that the final contract with the Government was made, not by the sponsors themselves (the Dixon-Yates group), but by the respondent, a creature of the sponsors. See *Finch* v. *Riverside & A. Ry. Co.,* 87 Cal. 597, 25 P. 765. No claim has been made in this litigation that respondent is independent of the sponsors, or other than their alter ego. The first finding below (R. 49) is that respondent is wholly owned by the sponsors, and the third finding (R. 49) recites that the contract in suit resulted from the sponsors' proposal of April 10, 1954.

stockholder of a lumber company which served as a subcontractor supplying lumber to a prime contractor with the city. Prior to the formal execution of the contract, there had been an understanding between the prime contractor and the councilman that his firm would supply the necessary lumber if the prime contractor's bid was accepted. In holding that the councilman had an interest in the prime contract fatal to its validity, the court held: "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connectron made, the contract is void." 27 Wash. at 549, 68 P. at 206. Accord, *Bissell Lumber Co.* v. *Northwestern Casualty & Surety Co.*, 189 Wis. 343, 207 N.W. 697.

The contrary interpretation of the federal statute by the court below reads out the phrase "indirectly interested", and defeats the manifest purpose of Congress. If it is to achieve its purpose of protecting the United States, and if "indirectly" is to be given its ordinary meaning, 18 U.S.C. 434 must extend "to private gains which flow recognizably from profits or contracts even though the gains pass through other hands or instrumentalities before realization by the officer concerned." *Compilation of Certain Memoranda Prepared by the Office of the Senate Legislative Counsel on Conflict of Interest Statutes*, Senate Committee on Armed Services, 84th Cong., 1st Sess., p. 20. Otherwise, conduct such as Wenzell's will go undeterred and even, in the light of the opinion of the majority below, approved.

As shown above (*supra*, pp. 35–42), the all-inclusive terms of the legislation were designed to prevent the Government's actions in its dealing with private parties "from being influenced by *anyone* interested adversely to it." (*United States* v. *Chemical Foundation*, 272 U.S. 1, 18, emphasis added) and for "the removal of *any* temptation to violate" the trust relationship of public office (*Rankin* v. *United States*, 98 C. Cls. 357, 367, emphasis added). The statute, and particularly the term "indirectly interested," should be construed in the light of this purpose.

This approach to legislation of this type is reflected in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, involving other sections of the same Act (Act of March 2, 1863, 12 Stat. 696) from which 18 U.S.C. 434 is derived (see fn. 10, *supra*, p. 38). There, the Court held that the false claims sections of the Act were to be construed, not with the "utmost strictness," but according to their fair intendment. The case involved claims for payment submitted by contractors of local municipalities to the municipal authorities. Although the United States indirectly supplied most of the funds for payment of the claims, the Court of Appeals held that the absence of a direct contractual relationship between the United States and the claimants barred application of the Act. Looking to the broad objectives of the statute, this Court rejected the contention that the contractors were immune from liability because their claims were presented "indirectly" via the local contracting authorities. The absence of privity did not deprive the United States of the statute's protection.

The same considerations apply to 18 U.S.C. 434. As *Marcus* v. *Hess* teaches, "[s]ound rules of statutory interpretation exist to discover and not to direct the Congressional will." 317 U.S. 537, 542. "[E]ven penal provisions must be 'given their fair meaning in accord with the evident intention of Congress.' *United States* v. *Raynor,* 302 U.S. 540, 552." *Rainwater* v. *United States,* 356 U.S. 590, 593. Cases of the kind at bar fall both within Section 434's literal terms and its evident purpose to protect the United States from the corrupting tendencies inherent in the bare fact that federal representatives have a significant pecuniary interest in the agreement they are negotiating. It matters not whether the Government employee's adverse interest derives from a direct relationship with the contractor, or indirectly from his connection with a prospective subcontractor which stands to profit from the contract of the business entity with which the United States is directly dealing. Congress was not concerned with the niceties of privity (cf. *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537), but with the possibilities of fraud, undue influence, and absence of single-mindedness. It was doubtless aware that the temptations which may lure an employee from the strictly impartial performance of his duty can be as present where the dual interest arises from a relationship with a potential subcontractor as where the employee is an officer or agent of the potential prime contractor itself. The exception for employees of prospective subcontractors which the court below finds in the statute was not put there or suggested by Congress—which is, of course, the prin-

cipal organ for the establishment of standards of conflict-of-interest, and which has left the broad wording of 18 U.S.C. 434 in effect for almost a century.

In this case, the temptations of self-interest (flowing from a conscious or subconscious desire for personal gain through First Boston's probable participation if an agreement were reached by the Government with the Dixon-Yates group) *could* well have led Wenzell to concur too easily with the sponsors as to specific items of the proposals or of the cost-estimates (even though there might not be any disagreement between the Government and the sponsors on the desirability of a private rather than public project); or to fail to press the Government's position or interests vigorously enough (on items of cost, etc.); or to counsel acceptance by the Government of a proposal which should not have been approved by the Government in that form, at that price, or on the basis of the cost-estimates submitted. Cf. *Miller v. City of Martinez,* 28 Cal. App. 2d 364, 369, 82 P. 2d 519, 523. To this must be added the very real temptation to use his position as a representative of the Government to advance the interests of his company as a prospective financial agent in the transaction. These temptations, which were inherent in Wenzell's position "working both sides of the street", as one Government employee put it to Wenzell (F. 76, R. 90), were all that is necessary to bring his conduct within the language and purpose of the statute.

(*b*). For the same reasons, Wenzell's activity was not put outside the statute because his firm, First Boston, did not have an outright commitment for the

financing but only a very high probability of obtaining it. As the court below admits in its opinion, "by the logic of circumstances" First Boston "might be offered the work of arranging the financing of the project when and if a contract" should be made (R. 16). If 18 U.S.C. 434 is properly read, such a plain possibility that the federal official's private firm would become an important subcontractor under the prime contract being negotiated is sufficient to give him at least an "indirect interest" in that agreement. "Absence of financial return during the period of * * * public service is not a complete answer to the sweeping prohibition of the statute. An interest 'directly or indirectly' in a contract may include an interest the fruition of which is postponed or implicit as well as one which is immediate and in stated terms." *Yonkers Bus* v. *Maltbie,* 23 N.Y.S. 2d 87, 91.

Actually, the Court of Claims' findings show that it was Wenzell's own conduct which, in large part, made it so likely that First Boston would become the financial agent on the project. By the time of Dixon-Yates' second proposal (*supra,* pp. 7, 17), April 12, 1954, both Wenzell and Edgar Dixon understood that First Boston would receive the financial agency for the project (Fs. 108, 116, R. 107, 113). This was but two days after Wenzell considered his Government service to have ended (F. 105, R. 106), and seven months before the contract was formally consummated (F. 3(c), R. 50).

Wenzell put First Boston in the picture at the very first meeting he attended as a government representative. He brought Paul Miller, a First Boston vice-

president to the meeting of January 20, 1954, at which the groundwork for the project was laid (Fs. 49, 50, R. 72, 73).[16] He discussed the project at various times with Miller as it developed, and Miller took over for First Boston in April 1954, with respect to this project, and was eventually assigned responsibility for First Boston's share of the financing (Fs. 109, 110, 112, 114, 115, R. 107, 109, 110, 111, 113).

Early in February 1954, Wenzell was obtaining financial information from his firm as "a personal favor" for Dixon (F. 57, 58, R. 77). It is not surprising therefore that by the latter part of the month Dixon and his counsel were talking in terms of giving First Boston first consideration as financial agent (F. 68, R. 84). This was after Wenzell had already offered them assurances on behalf of his company that the project could be financed at certain interest rates (F. 67, R. 82).

The sponsors relied upon this information to advise the Government that their proposal was based on assurances from financial specialists that financial arrangements could be consummated on the basis set forth in the proposal. Wenzell was fully aware of the significance of these recitals in the proposals (F. 67, F. 104, R. 82, 105). Indeed, on February 23, 1954, he told Assistant Budget Director Hughes that there was a very distinct possibility that First Boston might be retained, and that he had made a moral commitment which could be invoked by the sponsors

[16] Wenzell also brought Powell Robinson, a vice president of First Boston, to sit as an observer during a review of the sponsors' first proposal (R. 74, R. 89).

against his company to arrange for financing at the rates stated in the proposal (F. 69, R. 85). Significantly, when he discussed his dual status with Budget Bureau Director Dodge on March 9, 1954, his principal concern was that his firm might find itself barred from the transaction because of his activities for the Government (F. 85, R. 95). The very next day, however, he attended a meeting which he had arranged between the Chairman of First Boston's Finance Committee and Dixon, for the purpose of confirming the representations Wenzell had already made to the sponsors (F. 86, R. 95). Such actions continually kept his company (First Boston) to the forefront of the proposal negotiations.[17]

(*c*). Since 18 U.S.C. 434 is a flat preventive prohibition, it is irrelevant that (1) no derelictions in negotiating on behalf of the Government may have been proved against Wenzell; (2) the final contract with respondent turned out to be fair and honest; (3) Wenzell himself did not subjectively believe that

[17] First Boston's fees for serving as financial agent would have been quite substantial; it received $170,000 in fees and expenses for its work on a similar project (F. 27, R. 59). Nevertheless, it waived its fee in connection with this project. Its decision to do so was based in part upon the belief of Chairman Woods that the financing had flowed directly from his offer of Wenzell's services to the Bureau of the Budget in 1953 (F. 117, R. 114). Its counsel had also suggested waiver of fee when Wenzell obtained advice about his status (F. 72, R. 87). Wenzell's influence and participation in the transaction was an accomplished fact before First Boston's executive committee, after some opposition, made its unprecedented decision to give up the fee (F. 117, R. 114). The matter was not finally settled, however, until after Wenzell's activities had become a public issue (F. 120, R. 115; F. 121, R. 116).

he was advising parties whose interests were in conflict (F. 106, R. 106), or (4) Wenzell's general goal of having the project built by private enterprise may have accorded with that of the Government (R. 13–14).

Certainly, it need not be shown that corrupt or partial acts actually occurred; that they *might* have occurred is sufficient. Cf. *Crawford* v. *United States*, 212 U.S. 183, 192; *Crocker* v. *United States*, 240 U.S. 74, 80. The statute "does not stop with actual violations of * * * trust relations, but includes within its purpose the removal of any temptation to violate them." *Rankin* v. *United States*, 98 C. Cls. 357, 367; see also *Muschany* v. *United States*, 324 U.S. 49, 64–65, 67. Nor is it relevant that the United States did not suffer any financial loss or disadvantage as a result of the transaction. *Pan American Co.* v. *United States*, 273 U.S. 456, 500; *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 53; *United States* v. *Carter*, 217 U.S. 286, 305. The thrust of the statute is not towards what was actually done or towards the consequences of what was actually done. As with contingent fee contracts, "The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear." *Hazelton* v. *Sheckells*, 202 U.S. 71, 79; cf. *United States* v. *Carter*, *supra*, at 306. See also, *infra*, pp. 71–74).

Rather, the injurious possibilities of double-interest led Congress to establish an across-the-board rule, independent of the particular consequences of the particular situation. Congress recognized that where the Government representative's position is am-

biguous, subject to division between private interest and public duty, his ability to serve the United States loyally and faithfully must remain in doubt. The purpose of Section 434 was to remove even the shadow of such a doubt, to assure that transactions of the Government with private parties would be above suspicion and not require detailed scrutiny in every instance for signs of partiality or disloyalty. Cf. *United States* v. *Chemical Foundation*, 272 U.S. 1, 18. Wenzell's participation as a dual agent deprived the United States of this assurance.

Similarly, Wenzell's subjective attitudes toward the transaction are of no significance. The statute establishes an objective standard of behavior which serves as a legal embodiment of a sharply felt ethical need. It may well be, as a deeply concerned student of these problems has written, that conduct such as Wenzell's is accepted practice in the business community in which he normally operates. Paul H. Douglas, *Ethics in Government, The Godkin Lectures at Harvard University*, 1951, p. 25. But, as the same writer also pointed out, a much higher standard is demanded in the public service. *Id.* at p. 26.[18] Wenzell was well aware of this high standard, both

[18] The difference between private business activities and public business activities is reflected in the rule "that the directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. [But a] stricter rule is laid down in regard to public corporations and it is held that a member of official board or legislative body is precluded from entering into contract with that body, and this is often enacted in statutes. * * *" 6 Williston, *Contracts*, Sec. 1735 (Rev. ed. 1938).

from the warnings of his firm's counsel and from the comments of some of the career Government people with whom he worked (F. 76, R. 90).[19] Indeed, although he was concerned that his dual role might prejudice his employer's opportunity to obtain the financial agency for the project, he chose to ignore the problem as if this were an ordinary private transaction.[20] But for activities of the Federal Government, Congress was not satisfied with an ethic which permits one transacting business for another to have a private economic interest in that transaction. It flatly condemned such action in 18 U.S.C. 434.

The majority below also suggested that there could be no conflict of interest because Wenzell's desire to

---

[19] Assuming that Wenzell acted in full good faith, such good faith does not take his conduct out of the statute for purposes of determining the legality of that conduct in a civil action on the tainted contract. See the discussion, *infra*, pp. 67 *ff*. The effect of such good faith on a criminal prosecution need not be considered here.

[20] Wenzell seems to have forgotten that there ever was a problem about his activities. Despite the numerous conversations he had concerning his status, he ignored the advice of counsel to resign in writing and to keep Budget Director Dodge and Assistant Director Hughes fully informed about any decisions which First Boston might make concerning the project (F. 72, R. 87). Although he had expressly promised Budget Director Dodge to submit to the Bureau of the Budget for its prior approval any question of compensation or publicity regarding financing for the project which involved his company, (F. 85, R. 95), he never kept this promise (F. 127, R. 117–118). The Bureau of the Budget, the only Government agency aware of the problems arising out of Wenzell's status, did not learn that First Boston was retained as financial agent until February 18, 1955, more than three months after the formal contract had been signed (F. 127, R. 118).

obtain a contract paralleled the Government's. But it is always the general goal of one with an interest in a prospective Government contract to advance that interest by making a contract binding on the Government. That is the very reason such interests are condemned. Under the majority's view, it is difficult to see how there could ever be a conflict within 18 U.S.C. 434. Although the interests of the Government and its representative may be, in a wider sense, parallel in such a situation, they stem from sharply different sources. For the one derives from a particular view of the public interest, be it wise or unwise; the other may be motivated by a simple incentive to profit from the transaction, and therefore may lead to partiality in negotiation of the terms of the transaction or even to inducing the consummation of a particular agreement which should not have been made at all.

II

WENZELL'S CONDUCT WAS NOT EXEMPTED FROM 18 U.S.C. 434 BY THE FACT THAT HIS SUPERIORS IN THE BUDGET BUREAU WERE AWARE OF HIS DUAL ROLE

In holding that there was no violation of 18 U.S.C. 434 the Court of Claims placed heavy reliance on the fact that Budget Bureau Director Dodge and Assistant Director Hughes were aware of Wenzell's relations with First Boston (see the Statement, *supra*, pp. 18 *ff*). This knowledge was not shared by the Atomic Energy Commission, the agency with legal responsibility for making the contract, while the transactions in which Wenzell participated were being negotiated (F. 126, R. 117; Statement, fn. 5, *supra*, p. —.

21). The failure of Wenzell's Budget Bureau superiors to appreciate the illegal nature of his participation in the transaction does not exempt his conduct from the statute's provisions.

The statute directly regulates the conduct of persons who are called upon to act as officers or agents of the United States in the transaction of business with private entities. The primary burden of conforming his conduct to its prescription rests upon the person filling this role. 40 Op. A.G. 289, 294; 39 Op. A.G. 446. No individual representing the Government can properly claim that the statute authorizes his participation simply because his superiors do not discern a conflict of interest in his status. *Prosser* v. *Finn,* 208 U.S. 67, 74; *Ewert* v. *Bluejacket,* 259 U.S. 129, 138; *United States* v. *Dietrich,* 126 Fed. 671, 676. (C.C. D. Neb.). This is strikingly illustrated by *Prosser* v. *Finn, supra.* In that case, a special agent of the federal General Land Office was defending the validity of an entry made by him on public lands. R.S. 452 prohibited officers, clerks and employees of that Office "from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." The agent relied upon the opinion of the Commissioner of the General Land Office who had concluded that R.S. 452 did not apply to special agents. This Court held that Congress had, without qualification, prohibited a person of the agent's status from acquiring a direct or indirect interest in public lands, and that his entry was therefore void. His case was not advanced or

put beyond the statute by reliance upon the opinion of his superior.

In considering the effect of the actions of Wenzell's superiors, the court below failed to recognize that 18 U.S.C. 434 is a Congressional disqualification whose prohibition is directed at the individual called upon to act for the United States in a transaction. That a Government representative's superiors may have assigned him to the transaction, even with knowledge of his ambiguous status, does not take him out of the statute, since Congress has provided otherwise. Cf. *Watson* v. *City of New Smyrna Beach*, 85 So. 2d 548 (Fla.). The prohibition was designed by Congress to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. No official is authorized to make exemptions, and certainly neither the Director nor the Assistant Director of the Budget Bureau was empowered to exempt anyone from the conflict-of-interest laws. What they were powerless to do directly could not be accomplished indirectly by acquiescence in, condonation of, or ignorance of violations of the law.[21]

[21] The only instance in which Congress has delegated the power, normally reserved to itself, of granting exemptions to 18 U.S.C. 434 was in Sec. 710 of the Defense Production Act of 1950, Act of September 8, 1950, 64 Stat. 819. Even then, the power of exemption thus delegated was restricted to the highest executive level—the President. After reconsidering the need for such exemptions in time of peace, Congress expressly prohibited consultants retained under the Defense Production Act from participating in the negotiation of contracts. 69 Stat. 582, 50 U.S.C. App. 2160. See H. Rep. No. 1343, 84th Cong., 1st Sess.; H. Conf. Rep. No. 1630, 84th Cong., 1st Sess.

Even if their actions can be taken as an approval of Wenzell's activities, such approval would be, in view of the statute, without legal significance here. Any official who purports to waive the statute's provisions without express authority from Congress is acting without authority; those unauthorized acts cannot stand against express law. See, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *San Francisco*, 310 U.S. 16; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409.

Both the Director and the Assistant Director of the Bureau of the Budget considered themselves fully competent to assess the legal consequences of Wenzell's dual role. Neither official felt it necessary consult the legal officers of the Government, although they did feel it necessary for Wenzell "to report the situation to his principals in First Boston" and to obtain the advice of counsel (F. 69, R. 85). If First Boston had no interest in the transaction, it is difficult to see why the legal consequences of Wenzell's role should have been of concern to it at that time. On the other hand, Wenzell's connection with First Boston was of great concern to the United States, whose legal officers were not consulted.

It would amount to a drastic amputation of the statute if acquiescence (even in good faith) by an officer's superiors in his prohibited double-agency excused the violation and deprived the United States of the very protection the statute was intended to confer. Yet this is precisely what the court below has held. The majority's opinion was plainly influenced by its feeling that the Government's position in this

litigation was (in its view) "essentially cynical" in the light of the Budget Bureau's knowledge of Wenzell's double-agentry (R. 17). We submit that there is nothing cynical in an attempt by the United States to vindicate important statutory rights—vital to the conduct of the Government—of which it was mistakenly deprived by a lax misinterpretation of law by its own officials. Congress itself has established a governing standard not to be mitigated by the individual views of any public servant. As was observed in a related context, "indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress." *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 308–309.

III

THE CONTRACT WHICH FOLLOWED FROM THE TRANSACTIONS IN WHICH WENZELL PARTICIPATED IS UNENFORCEABLE UNDER THE POLICY OF 18 U.S.C. 434

The concurring opinion below observed that when the United States has solemnly pledged its word in a contract, that covenant must be kept whether the bargain is good or bad (R. 31). We do not quarrel with that principle. See *Muschany* v. *United States*, 324 U.S. 49, 66–67; *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289. But that is not the issue here. The problem before the Court involves, not the mere wisdom of a bargain, but the enforcement of a bargain infected from its inception with a conflict-of-interest specifically forbidden by Congress. Wenzell's activi-

ties in violation of 18 U.S.C. 434 led directly to the making of this contract in circumstances in which the Government and the public can never be certain that their interests were loyally and faithfully represented during the crucial initial stages of the transaction. It was to provide this certainty that Congress enacted the statute. Under accepted principles, the contravention of this statute would render the contract unenforceable as contrary to the public policy established by Congress. The court below refused to apply this settled rule largely because it would not impose this heavy sanction upon the respondent, which was not Wenzell's employer and therefore could not dismiss him. This misplaced concern for respondent rests, in our view, on a failure to appreciate both respondent's actual role in the transaction and the appropriate relationship of the sanction of non-enforcement to the policy embodied in Section 434. Non-enforcement does not depend upon whether the contractor is guilty or innocent of wrongdoing, but upon whether the contract was formed in circumstances in which the integrity of the transaction is in doubt.

A. A CONTRACT IN VIOLATION OF A PROHIBITORY STATUTE IS UNENFORCEABLE

1. *The general rule of non-enforcement*

Section 434 does not expressly provide that the consequences of a violation will be invalidation of contracts which issue from the unlawful transaction.[22] But this result follows from the clear language and

[22] 18 U.S.C. 216 is the only conflict-of-interest statute expressly providing for disaffirmance of contracts made in violation of its terms.

evident purpose of the statute. "Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment." *Frost & Co.* v. *Mines Corp.*, 312 U.S. 38, 43. Whether a contract substantially infected by a violation of statute will be enforced requires consideration of the broad purpose of the statute and the effect of non-enforcement on that purpose. *Id.* at 44–45. See also *Deitrick* v. *Greaney*, 309 U.S. 190; *Kimen* v. *Atlas Exchange Bank*, 295 U.S. 215.

It is familiar law that contracts which in their formation or performance violate prohibitory statutes are unenforceable. *E.g.*, *Miller* v. *Ammon*, 145 U.S. 421; *Burck* v. *Taylor*, 152 U.S. 634; *Bank of the United States* v. *Owens*, 2 Pet. 527; Rest. Contracts, Sec. 580(1); 6 Williston, *Contracts*, Sec. 1763 (Rev. ed. 1938). There are numerous cases holding public contracts unenforceable against the public entity which made them because a government official had a direct or indirect interest in the agreement in violation of a statute prohibiting such interests. See, *e.g.*, *City of London Electric Lighting Co.* v. *London Corp.*, [1903] A.C. 434 (House of Lords) (stockholder's interest); *Finch* v. *Riverside & A. Ry. Co.*, 87 Cal. 597, 25 P. 765 (interest in group formed to organize public utility corporation); *Miller* v. *City of Martinez*, 28 Cal. App. 2d 364, 82 P. 2d 519 (employee's interest); *Watson* v. *City of New Smyrna Beach*, 85 So. 2d 548 (Fla.) (partner's interest); *Northport* v. *Northport Townsite Co.*, 27 Wash. 543, 68 P. 204 (interest in prospective subcontractor); Annotation, 140 A.L. R. 345; McQuillen, *Municipal Corporations*, Secs. 29.97–

29.99 (1950 ed.); 6 Williston, *Contracts,* Sec. 1735 (Rev. ed. 1938).

Earlier decisions of the court below have held that no implied contract could be formed between the United States and a partnership (*Rankin* v. *United States,* 98 C. Cls. 357 (discussed *supra,* pp. 39–40))[23] or a corporation (*Curved Electrotype Plate Co.* v. *United States,* 50 C. Cls. 258) when one of the parties transacting business for the Government had an interest in the transaction prohibited by the statutory antecedent to 18 U.S.C. 434.[24] The *Rankin* and *Curved Electrotype* cases turned upon the broad rule of *Michigan*

[23] In *Rankin,* the Court of Claims said (98 C. Cls. at 367):

> * * * the principal, on being informed of the participation of his agent on his own account and interest in a transaction wherein there was an obligation to represent the principal, may disaffirm the contract so entered into without reference to any actual damage to the principal or benefit to the agent.

[24] Although the validity of contracts under the statutory antecedents of Section 434 have been drawn in question in a few other cases, none of them is in point. In *United States* v. *Chemical Foundation,* 272 U.S. 1, the corporation involved was actually organized by public officers for the purpose of carrying out the policies of the Trading with the Enemy Act; they had no financial interest in it. In view of this, and of the public nature of the corporation, the conflict-of-interest statute was held inapplicable. *Muschany* v. *United States,* 324 U.S. 49, involved the validity of use by the Government of a purchasing agent paid by commission instead of by salary. *Architects Building Corporation* v. *United States,* 98 C. Cls. 368, is discussed *supra,* p. 40, n. 11. *Holst* v. *Butler,* 379 Pa. 124, 108 A. 2d 740; *Johnson* v. *Sundstrand Machine Tool Co.,* 204 F. 2d 783 (C.A. 7); and *Atkinson* v. *New Britain Machine Co.,* 154 F. 2d 895 (C.A. 7), did not involve the rights of the United States, and the records in those cases did not show that the party charged with the illegal interest had ever represented the United States in business transactions with the com-

Steel Box Co. v. *United States*, 49 C. Cls. 421, 439 (quoted *supra*, p. 40), in which it was held that the law condemns public contracts in which Government representatives have a private interest because such interests are temptations to violate the fiduciary relation between the Government and its agents. Though there was no proof of a corrupt agreement, of fraud, or of disadvantage to the United States, the violation of the statute in ***Rankin*** and ***Curved Electrotype*** had deprived the United States of the disinterested representation to which it was entitled. This factor clearly underlay the Court of Claims' refusal to enforce the implied contracts sued upon. See also ***Muschany*** v. *United States*, 324 U.S. 49, 66–68.

2. *Corruption need not be shown to invalidate the contract*

At common law, public contracts may be invalidated whenever improper influence over the making of the contract is proved. In ***Pan American Co.*** v. *United States*, 273 U.S. 456, and ***Mammoth Oil Co.*** v. *United States*, 275 U.S. 13, the famous "Tea Pot Dome" cases, there was a corrupt relationship between the Govern-

panies in which they were interested. *Ingalls* v. *Perkins*, 33 N.M. 269, 263 P. 761, also did not involve the rights of the United States, but the claim of a Public Health Service physician against a sanitorium operator for professional services to disabled veterans boarded with her under federal contract. The physician, in the exercise of his professional duties for the Government, could recommend generally that veterans be placed in contract hospitals, but he had no influence over the assignment of patients to particular institutions. It was therefore held that his interest was too remote to constitute a conflict under the statute. Despite its limitation to special facts, the *Ingalls* decision has been criticized. *Federal Conflict of Interest Legislation*, Hearings before the Antitrust Subcommittee, House Committee on the Judiciary, 86th Cong., 2d Sess., p. 476.

ment's representatives and the corporations involved. In *Crocker* v. *United States*, 240 U.S. 74, public contracts were invalidated because a Government representative had a fraudulent, concealed interest in the contract he was charged with administering. But under 18 U.S.C. 434, the United States is not required to wait until corruption has occurred, or until the temptations of a dual interest have flowered in fraud. Just as corruption will invalidate a contract without a showing of direct financial interest on the part of the Government's representative, without evidence that the United States suffered any loss or disadvantage, or without any proof of criminal bribery (*Pan American Co.* v. *United States, supra,* at 500; *Mammoth Oil Co.* v. *United States, supra,* at 53), so a violation of 18 U.S.C. 434 will render unenforceable a contract based on that violation without a showing of corruption. As we have stressed (*supra,* p. 35 ff), this legislation is preventive and objective; the existence of the prohibited dual-interest suffices, without more, to bring the statute into operation.

Decisions invalidating infected agreements under similar statutes from other jurisdictions rest upon the same considerations of legislative purpose. "It is not necessary to show factual fraud, dishonesty or loss to invalidate the transaction. The purpose of the statute is to remove all indirect influence on an interested officer as well as to discourage deliberate dishonesty." *Hobbs, Wall & Co.* v. *Moran,* 109 Cal. App. 316, 319, 293 P. 145, 147. See also, *e.g., Gillen* v. *Milwaukee,* 174 Wis. 362, 371, 183 N.W. 679, 682; *Nunemacher* v. *Louisville,* 98 Ky. 334, 337, 32 S.W. 1091; *Miller* v. *City of Martinez,* 28 Cal. App. 2d 364, 369

82 P. 2d 519, 523; *Lesieur* v. *Rumford*, 113 Me. 317, 319, 93 Atl. 838, 839; *Watson* v. *City of New Smyrna Beach*, 85 So. 2d 548 (Fla.); *Stockton Plumbing & Supply Co.* v. *Wheeler*, 68 Cal. App. 592, 601–602; 229 P. 1020, 1024; *City of London Electric Lighting Co.* v. *London Corp.*, [1901] 1 Ch. 602, 613 (per Rigby L. J.)[25]

Congress was not satisfied with the traditional legal remedies which direct invalidation of contracts shown by evidence to be tainted by the proven dishonesty of its representatives. In Section 434 it went beyond these remedies in order to immunize the contracts of the United States, by a broad prohibition, against the tendencies toward infection which are inherent in dual-interests on the part of its representatives. When the nation has been deprived of that shielding immunity, there is no way of measuring the consequences of the dual interest upon the contract, for corrupting self-interest does not appear in obvious forms. See *Hazelton* v. *Sheckells*, 202 U.S. 71, 79. Cf. *United States* v. *Carter*, 217 U.S. 286, 305–306. The entire transaction is wrapped in doubt and uncertainty as to whether it is the product of the

[25] Professor Williston has suggested that in cases of indirect interest "there is more reason for considering each case on its special facts, and for holding those illegal only where lack of proper disclosure, fraudulent intent or some unfairness exists." 6 Williston, *Contracts*, Sec. 1735 (Rev. ed. 1938). Such an approach would defeat the legislative purpose in prohibiting even indirect interests and would remit public bodies to the narrower remedies of the common law. *Cf. United States* v. *Carter*, 217 U.S. 286. Of course, each case must be decided in light of the particular statute involved. In this case, the legislative policy clearly bars resort to the limitation suggested.

faithful and disinterested representation which Congress wished to assure for public contracts. Under the policy of the statute, therefore, the participation of a Government representative with a private interest in the transaction is all that is necessary to invalidate the contract. There is no need to show secret arrangements, fraudulent dealings, or actual loss or disadvantage to the Government. See also *supra*, pp. 60–61. The elements of the statute themselves define a relationship to the business being transacted which, in the congressional judgment, is sufficiently woven into the transaction to constitute a danger to the public interest. This legislative determination lays down the public policy which must control the judicial inquiry "as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case." *Muschany* v. *United States,* 324 U.S. 49, 66.

B. THE CONTRACT IS UNENFORCEABLE WHETHER OR NOT RESPONDENT CONTRIBUTED TO VIOLATION OF 18 U.S.C. 434 BY WENZELL

1. Respondent answers that not only was it without responsibility for Wenzell's role in the transaction, but that its sponsors' efforts led directly to termination of Wenzell's dual role and his return to work exclusively in First Boston's interest (Br. in Opp., p. 6). The findings do not bear out this exculpatory plea. The sponsor's professed concern was not that there was a conflict of interest, but that Wenzell's activities might be used as ammunition in the public-versus private power fight to "make it appear that

there was a 'taint of illegality' " (F. 68, R. [illegible]). They were aware of the situation before February 23, 1954, and knew the following week that Wenzell had been advised by First Boston's counsel to resign (F. 78, R. 92). Despite this, they continued to deal with him while he was a Budget Bureau representative. Indeed, on March 16, 1954, Wenzell made changes in his own handwriting on a draft of a reply the sponsors were preparing to a TVA-AEC analysis of their first proposal (F. 90, R. 98); and they or their representatives met him in meetings with other Government representatives on March 2, March 15 and April 3, 1954 (F. 75, R. 75; F. 89, R. 89; F. 97, R. 100). Wenzell never formally resigned (F. 72, R. 88), and there is no finding that he ever told the sponsors that he had done so, yet they had no hesitancy in dealing with him on the same basis as before his status was questioned. He performed the same services for them in First Boston's behalf that he had been performing for them in the Government's behalf a few weeks before (compare F. 67, R. 82, with F. 104, R. 105). In short, respondent's sponsors continued to deal with Wenzell and with First Boston despite their full awareness of Wenzell's dual position.

2. Much stress is also laid below upon the fact that the sponsors could not remove Wenzell from the transaction because they had not put him in it (R. 16). However, as we have pointed out, they were fully aware of Wenzell's dual role, and it was within their power to remove the conflict-of-interest implicit in it. They could have done this by refusing, so far

as they could, to deal with him. Yet in this transaction even this brusque but safe procedure was not necessary. They could easily have removed the conflict by destroying the basis for Wenzell's self-interest in the contract; they had only to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction. Wenzell himself was aware of this possibility (F. 85, R. 95). And the sponsors knew that First Boston was not the only investment bank in New York which could be consulted about interest rates and the placement of securities (Fs. 62, 101, R. 79, 103).[26]

Instead, despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell; they dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract. See the Statement, *supra*, pp. 15–18, 23–25. Respondent has little ground upon which to claim credit for Wenzell's withdrawal from the transaction *after* the acceptability of their proposal was established. The means of clearing the air of the "taint of illegality" were readily at hand from an early date and simple to apply, but, for all their alleged concern about Wenzell, somehow were never used.[27]

---

[26] As noted *supra*, p. 51, First Boston was anxious to become the financial agent for the project.

[27] Chief Judge Jones suggested in dissent below that the Dixon-Yates people, who were no "novices", may have wished to have Wenzell (who was known to them) as a "friend on the

3. In any event, contracts tainted by violation of 18 U.S.C. 434 are not invalidated because the private contractor is guilty of complicity in the violation or because it failed to discern and effectively remove the infecting violation. Invalidation is not fundamentally a sanction against the contractor, but a guarantee of the integrity of the federal contracting process. "It is not the character of the contract itself, but the manner in which it is created, that renders it violative of sound public policy." *Schaefer* v. *Berinstein*, 140 Cal. App. 2d 278, 290, 295 P. 2d 113. See the discussion, *supra*, p. 72. There are many situations in which a contracting party, without misconduct on its part, may find that the requirements for absolute integrity in the formation of Government contracts deprive it of benefits under an otherwise lawful bargain. For example, in *Crocker* v. *United States*, 240 U.S. 74, the Postmaster General refused to honor a contract to furnish the United States with mailbags because a postal official charged with duties relating to the contract had a direct interest in profits thereunder. Until the Postmaster General's action, the contracting company had no actual knowledge of the corrupt arrangement, which was made by its agents without its authorization. This Court held that the company, by accepting the fruits of the contract, had unknowingly ratified its agents' action. While its innocence might justify a recovery *quantum valebat* (see *infra*, pp. 79–80), it acquired no rights whatever under the express contract which had been tainted without its fault. The

---

inside" who could help them in the negotiations with the Government and in the financing. (R. 45).

reason for invalidation was not the company's misconduct; it was the need to protect the United States from tainted contracts. The decision relied upon the reasoning of *Tool Co.* v. *Norris,* 2 Wall. 45, 54–55 (240 U.S. at p. 79):

> All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * *

If Wenzell had been a substantial stockholder of the Dixon-Yates companies themselves, the Dixon-Yates group would have been powerless to dismiss him from his Government employment or to sever his connection with their own company. Yet, without any responsibility on their part for his participation in the transaction, the contract would have been clearly unenforceable, even if they had been unaware of his dual-interest. See, *e.g., Hardy* v. *Mayor, etc. of*

Gainsville, 121 Ga. 327, 48 S.E. 921; *Finch* v. *Riverside & A. Ry. Co.*, 87 Cal. 597, 25 P. 765; *Bartley, Inc.* v. *Town of Westlake*, 237 La. 413, 111 So. 2d 328; *Duncan* v. *City of Charleston*, 60 S.C. 532, 39 S.E. 265; *City of London Electric Lighting Co.* v. *London Corp.*, [1903] A.C. 434 (House of Lords); 6 Williston, *Contracts*, Sec. 1735, n. 9; McQuillen, *Municipal Corporations*, Sec. 29.99 (3d ed., 1950); Annotation, 140 A.L.R. 345.

These cases reflect the principle that the essential factor is not wrongdoing on the part of the contracting corporation, but the loss to the public entity of the guarantee of disinterest which the legislature intended should govern every stage in the development of a public contract.

4. A recovery *quantum valebat*, as on an implied contract, may be available to a plaintiff whose express contract is unenforceable because infected by a conflict-of-interest. *Crocker* v. *United States*, 240 U.S. 74, 81; cf. *Clark* v. *United States*, 95 U.S. 539. But the plaintiff must be without actual complicity in the unlawful arrangement. In *Rankin*, 98 C. Cls. 357, an implied contract case, *supra*, pp. 39, 70, the plaintiff had himself acted for the Government in the transaction. In a similar case, *Curved Electrotype Plate Co.*, *supra*, p. 71, the plaintiff was claiming rights arising from the actions of the Public Printer, the only Government representative with which it had transacted business; this official, however, was indirectly interested in the transaction. Recovery in *Rankin* was barred on an implied contract because the plaintiff was asserting rights arising from his own violation of the statute (98 C. Cls. at 367); in *Curved*

Electrotype, it was barred for the reason that the official representing the Government had no power under the conflict-of-interest statutes to bind the Government (50 C. Cls. at 272).

This distinction between the effect of the statute on express contracts and its effect on recovery in implied contract is not significant here. In this case, the United States received nothing and retains nothing under the arrangement with respondent. Therefore, recovery *quantum valebat* is not available to respondent, and the court need not consider what rights if any it might have if the United States had received anything of value from it.[28] The only basis upon which respondent can recover is under the terms of the express contract, which was, from the originating proposal, tainted by Wenzell's interest in the transaction.[29]

C. REFUSAL OF ENFORCEMENT TO TAINTED CONTRACTS IS AN EFFECTIVE REMEDY FOR PROTECTION OF THE UNITED STATES

Non-enforcement is an effective and appropriate protection for the United States against contravention of the Congressional mandate in 18 U.S.C. 434 by complacent, ignorant or negligent officials, as well as by conniving or negligent double-agents. And it has the important supplementary effect of inducing

---

[28] For the same reasons recovery *quantum meruit* as on a contract implied in law is also barred to respondent. In addition, the Court of Claims has no jurisdiction to grant relief of that nature. 28 U.S.C. 1491; *United States* v. *Minnesota Mutual Inv. Co.*, 271 U.S. 212, 217; *Merritt* v. *United States*, 267 U.S. 338.

[29] As indicated *supra*, pp. 74–76, we by no means concede respondent's total innocence with respect to the matter of Wenzell's participation.

contractors to do more than give lip service to the public policy against conflicts-of-interests. Certainly, non-enforcement is not unfair in a case such as this, in which the contractor had reason to know of the infecting interest yet did not take the simple steps necessary to remove that infection. If the shield of invalidation is available for the United States here, actual and potential contractors will do more than merely express concern over conflicts of interest. If, despite the clear Congressional policy to the contrary, non-enforcement is unavailable, then not even the faint objection exhibited here will be expressed in the future. For it will make no practical difference to the contractor even if a conflict-of-interest exists.

On the other hand, refusal of enforcement to tainted contracts such as in this case will not deter contractors from dealing with the United States. The business community has the same vital interest as other segments of the Nation in the integrity of the federal contracting process; it will not withhold itself from the opportunities for public service and legitimate profit which federal contracts provide because of the possibility that a contract infected by conflict-of-interest will be denied enforcement. On the contrary, together with responsible Government officials, it will be spurred to greater efforts to guard against such conflicts.

Similarly, non-enforcement will not make it more difficult for the United States to obtain expert consultants from private industry. Such consultants are already under a Congressional injunction not to act on behalf of the United States with any business entities in whose contracts they have an interest.

And Congress has indicated that, whatever exceptions to the conflict-of-interest policy may be necessary, the risks in having temporary consultants participate in negotiations with firms in which they are interested outweigh the advantages acquired from the services of experts who cannot accept this limitation. 69 Stat. 582, 50 U.S.C. App. 2160.[30]

It may be said that non-enforcement in circumstances such as are presented here would not obtain in private business arrangements and that it is too harsh a consequence to impose upon a contractor. But the United States does not stand upon the same footing as a private individual. *Pan American Co.* v. *United States,* 273 U.S. 456, 509. Its needs are vastly different from the business entities with which it deals. And there is nothing in private law which is analogous in scope to the broad prohibition against ambiguous interests established by Congress in 18 U.S.C. 434.

Procurement on behalf of the nation, with public moneys for public purposes, requires standards of integrity and fidelity greater than private business requires. If the level of wholesomeness in government procurement is to be maintained—if it is to be raised toward the unattained ideals of integrity our society has set for itself—then the protective remedies which

---

[30] The policy problems inherent in the definition of conflicts of interest and in the enforcement of existing standards are receiving continuous scrutiny by the Congress. See *Federal Conflict of Interest Legislation,* Hearings before the Antitrust Subcommittee, House Committee on the Judiciary, 86th Cong., 2d Sess. Compare H.R. 1900, 86th Cong., 2d Sess., with H.R. 10575, 86th Cong., 2d Sess.; see Hearings, *supra,* pp. 356-458.

assure that integrity must be enforced without equivocation. Government representatives should not be encouraged to rely upon a makeshift morality which winks at violations of law as trivial. Contractors who wink should not be encouraged to expect the courts to enforce infected contracts as if they were the spotless agreements Congress intended them to be.

Recognition of a public contract influenced by a government representative with a private interest in it undermines the honesty of all government procurement, and, in a larger sense, the moral standards of the whole community. Nevertheless, pleas for a special exception from the severe sanction of non-enforcement will always be raised and persuasively argued. But to prevent the nibbling away, case by case, of one of the great credos of our system of government—the principle of complete and single-minded probity in any public activity—tainted contracts such as this one must be held unenforceable even where out-of-pocket loss is inflicted on the contractor.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OSCAR H. DAVIS,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
Attorneys.

AUGUST 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

IN THE

Supreme Court of the United States

October Term, 1960

No. 26

THE UNITED STATES,
Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To the Use of Others,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

JOHN T. CAHILL,
Attorney for Respondent,
80 Pine Street,
New York 5, N. Y.

Of Counsel:
WILLIAM C. CHANLER,
ROBERT C. ZELLER,
MARGARET TAYLOR.

TABLE OF CONTENTS.

CITATIONS.

Cases:

Statutes

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 26

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY, On Its Own Behalf and To the Use of Others,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

QUESTION PRESENTED.

The United States is a party to a contract negotiated for it by the Atomic Energy Commission. The unanimous Findings of the court below are that it was negotiated in sessions which were lengthy, arduous and hotly contested, that such negotiations lasted from July 7 to November 11, 1954, a period of over four months, and that the representatives of the Atomic Energy Commission who negotiated the contract were competent and aggressive, with no one claiming that they lacked a singleness of purpose in representing the

interests of the Government. Over six months before these negotiations began, the Government determined, as a matter of policy, to seek a way to eliminate from the budget an item of over $100,000,000 for the construction of a power plant by the Government. To this end, the Bureau of the Budget undertook to get the contractor's sponsors to submit a proposal for the construction of such a plant which could serve as a starting point for negotiations and justify the elimination of this item from the budget. While doing so, the Bureau had as an unpaid consultant a man who was an officer and stockholder of an investment banking firm, as the Bureau of the Budget was fully aware. The unpaid consultant had no legal relationship with or interest in the contractor or its sponsors. The unpaid consultant engaged in no act to bind the Government or to make decisions on its behalf and had no power or authority to do so. He did not participate in the negotiation of the contract and did not even participate in the Government's decision to begin those negotiations. He terminated his consultancy long prior to such decision and negotiations, and this came about as the result of the prompt and effective steps taken by the contractor's sponsors. Neither he nor the investment banking firm with which he was connected, and which was retained by respondent as one of two financial agents after the unpaid consultant had terminated his Government connection, has any interest in this lawsuit. It is agreed that the unpaid consultant performed his duties for the Government faithfully, honestly and diligently. It is also agreed that the contract was fair and honest and that the entire proceedings were free from fraud and corruption. Eight months after the contract was executed, and after its primary budgetary purpose had been accomplished, a third party offered to build the required plant without cost to the Government. The Government therefore can-

cel'ed the contract. Under such circumstances may the Government repudiate its obligations under the contract on the ground that the unpaid consultant had an alleged conflict of interest?

STATUTE INVOLVED.

18 U. S. C. 434 provides as follows:

> "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

STATEMENT.

I. Introduction.

This is essentially a fact case. That it is such is testified to by the 246 numbered paragraphs of Findings covering 186 printed pages, by the 25 printed pages required for the petitioner to state the case even with selected omissions, and by the nature of the opinions below.

Petitioner's statement of the facts is set forth with such apparent fairness as to be disarming. Only in the light of two important considerations does one become aware that this apparent frankness is only an added example of what has gone on in this case ever since the Administration decided to attempt to rid itself of the political problem it had created by tossing the problem over to the judiciary (F. 128, R. 118). These two considerations are: first, that there are significant omissions and misleading implications

in the statement of facts; and, second, that the draftsman of the portion of petitioner's brief headed "Argument" apparently has not been introduced to the draftsman of its "Statement" of facts. These omissions and misleading implications will be specifically shown in the statement below and in our argument.

We are therefore compelled to restate the facts—as unanimously found—in order that this case may be decided on the basis of those facts.

The Court of Claims found without dissent* that respondent Mississippi Valley Generating Company (herein called "MVG") and its creditors (the "use-plaintiffs," who are also respondents here) had incurred certain expenses** in performance of the terms of the contract involved in this action. The judgment now sought to be attacked is a judgment for those expenses alone, since MVG did not seek or recover any element of profit.

The only issue in this case is the validity and enforceability of the power contract. In considering petitioner's so-called conflict-of-interest defense, it must be remembered that petitioner cancelled the contract, not because of any alleged conflict of interest on the part of Adolphe Wenzell or anyone else, but because, after the power contract had accomplished the Government's primary purpose of eliminating from the budget an appropriation of $100,000,000, the Government determined it would have no need for the power to be generated by respondent's plant (F. 206, R. 192-93).

---

* Although two judges wrote dissenting opinions, there was no dissent to these Findings. Likewise, petitioner states that it does not challenge the court's Findings of Fact (Pet. Br., p. 3).

** Some of these expenses had been paid by respondent before this action was brought; most had not. It is the unpaid creditors to whom such expenses were owed who are joined as "use-plaintiffs" in the action.

As the court below stated:

> "The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skillful bargaining by representatives of the Government who had complete fidelity to their trust, and which became useless to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power" (R. 17).*

The Findings of Fact demonstrate that the petitioner has raised the irrelevant and fallacious smoke screen regarding one Adolphe Wenzell, not to protect the Government as it piously reiterates throughout its brief, but simply to escape reimbursing respondent for the expenses respondent incurred while using its best efforts to have a power plant ready on the tight time schedule set by the petitioner.**

The contract was not a contract born of the desire of MVG or its sponsors for Government business. It was a contract initiated by the Government (Pet. Br., p. 5, Fs. 36-

* Petitioner has reaffirmed its concession here: "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59; see also Pet. Br., p. 29).

** That this is so is apparent from the other defenses, now abandoned, against which respondent had to contend in the trial. Each of these defenses was unanimously, almost summarily, rejected by the court below. Prior to respondent's lawsuit, petitioner's highest legal officers and principal administrative agencies had given formal opinions and decisions rejecting, and in some instances scornfully pointing up the fallaciousness of, various arguments which petitioner then solemnly turned around and asserted as affirmative defenses in this lawsuit. (See Fs. 152, 173, 187-189 and 203, R. 140-43, 157-61, 182-83, 187-90.) Indeed, the Department of Justice in its *Amicus Curiae* brief on behalf of the United States filed with the Court of Appeals for the District of Columbia on appeal from the SEC order approving respondent's equity financing for purposes of this contract, labeled some of the very arguments the same Department of Justice made in this lawsuit as a "stale rehash" and a position of "essential emptiness" (F. 152(e), R. 142-143).

43, R. 63-69). The origin of the contract has been well stated by petitioner itself:

> "To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, R. 57, 63-64)" (Pet. Br., p. 4).

The sponsors "were ready and willing to do anything possible, without regard to profit, to help with the problem of furnishing power" (F. 51, R. 73) or to make a contract to supply power "at whatever cost the Federal Power Commission deemed fair" (F. 51, R. 74). Moreover, the sponsors thought that the approach to the problem—*i.e.*, dealing through AEC rather than directly with TVA—was awkward, but despite their protestation this approach was decided upon by the Administration (F. 51, R. 74).

The Budget Bureau then took on Wenzell as a part-time consultant without compensation and asked him to stay in touch with the sponsors as a kind of "expediter," as the court below found, "to keep their [the sponsors'] interest alive and to get it into the form of a proposal which the Government could consider" (R. 13).

Wenzell, the alleged double dealer, was not used by the Government at the request of the sponsors; in fact, they protested his presence and warned that it might prove to be embarrassing (Pet. Br., pp. 18-19, 21; Fs. 68, 78, R. 84-85, 91-92). The sponsors knew that in the controversy over the general Administration policy in favor of investor-owned power as against Government-owned power, all kinds of fighting—even unfair fighting—would go on. As the court below accurately stated the matter (R. 16-17):

> "The sponsors, though they had not employed Wenzell, nor given him any interest in their enter-

prise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' admonition to Hughes [then Assistant Director, and later Director, of the Bureau of the Budget], who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government, but adequate to destroy the enemy if it became necessary to resort to such a weapon. There is, it seems to us, something essentially cynical about the Government's Wenzell defense."

Eventually, about eight months after the contract was made and the appropriation for a Government plant had been eliminated, the Government concluded it no longer had any need for the contract. This came about because the City of Memphis decided to generate its own power, thereby eliminating the problem of TVA's need for additional power which the Government had asked the respondent's sponsors to come in and solve for it—a problem which they in good faith and with great effort and expenditure of money and time had set about solving. Thus the Government, for its own business reasons, cancelled the contract.

Thereafter, when the political atmosphere became too hot for that same Government which had urged the sponsors to help—and for the very reasons about which the sponsors had warned the Government—the Government piously announced that the contract would not be recognized because of a question as to conflict of interest resulting from the Government's use of Wenzell. An election year was coming up and the whole problem was passed over to the courts.*

Petitioner contends MVG's contract should not be recognized because of a supposed violation of a criminal statute, not by MVG or its sponsors, but by Adolphe Wenzell. Despite such grave charges, petitioner bases its entire case on assumptions and inferences relating to Wenzell which, in turn, are based on a disregard and even distortion of the facts as found by the court below. Nor has any proceeding ever been instituted against Wenzell on such charges.

The insignificance of Wenzell's role in the contracting process is apparent from petitioner's own Statement at pages 4 through 9 of its brief. All the important facts relating to the contract are set forth on these pages of petitioner's brief. Yet there is no mention of either Wenzell or First Boston. The role of Wenzell was, despite petitioner's contention to the contrary, *de minimis*.

Wenzell's name, of course, appears often in the Findings, because he was the principal excuse of the Government in its attempt to avoid payment of its obligations

---

* Petitioner's brief (p. 25) refers to "the AEC's declaration that the contract was not valid." There never was any such declaration. What did come out of the AEC was the following timid conclusion by its General Counsel: "My conclusion is that there is a substantial question as to the validity of the contract which can only be settled in the courts" (F. 128, R. 118).

under the power contract. But although the Findings repeat Wenzell's name often for that reason, they also disclose the large number of important Government officials who took action and made decisions. Wenzell is not among them.

Wenzell's principal functions, as directed by Hughes, were to get estimates of future interest costs from First Boston and relay them to the Bureau of the Budget and the sponsors and from time to time to carry messages from Hughes to the sponsors to the effect that they should hurry with their proposals. On one occasion Nichols of the AEC suggested to Wenzell that he encourage the sponsors to refine their figures (F. 98, R. 101), but there is no finding and there was no evidence that he ever did so. In fact, the sponsors had already been told to do just that earlier the same day and in Wenzell's presence (F. 97. R. 100-01). Wenzell's insignificance on other matters appears from the findings that on March 9 Dodge was told by Wenzell that he was not qualified to advise the Bureau on matters of overall costs and suggested for this function Adams, Chief of the Bureau of Power of the FPC (F. 85, R. 95), from Wenzell's reiteration of this suggestion on March 15 when the question came up again (F. 89, R. 97-98), and from his previous response, to a Bureau request, that he was not qualified to answer questions about power engineering (F. 74, R. 89).

Wenzell was not a significant person in this transaction; he did not play a significant role; and despite the statements in Mr. Justice Reed's dissent and petitioner's brief that he "negotiated," he did not negotiate either for the Government or for the sponsors. The Findings are clear as to this and they reflect a record in which the Government had every advantage for proving a favorable case.

The fact is, as Judge Madden stated below (R. 13):

> "Wenzell had substantially nothing to do with the substance of the contract."*

As will be shown hereafter, petitioner has not proved even one of the basic elements necessary to establish the commission by Wenzell of a crime under 18 U. S. C. 434. Nor has anyone shown that the sponsors or any of the respondent's other representatives were guilty of any unlawful conduct or acted in any way not in accord with public policy. On the contrary, it is difficult to imagine a case in which there was as much disclosure and as much good faith and evidence of complete lack of fraudulent intent on the part of everyone concerned, both in and out of the Government, as was present in the months prior to the time the Government even decided to negotiate a contract with respondent. This is particularly so when one considers the fact that it was the efforts of the sponsors themselves which led to the termination of Wenzell's services with the Government before any possible conflict could exist, and many months before the petitioner and respondent were finally able to reach an agreement on the contract.

As Judge Bryan stated in his concurring opinion:

> "The very law points now mooted to defeat the contract as unauthorized were originally vouched by the Government to conclude it. These remain

---

* Compare the statements in petitioner's brief on pages 2, 34, 44 and 50 that Wenzell was himself a "significant" person or played a "significant role" with regard to the contract.

Another phase of petitioner's adjectival attack is its reference to the preliminary discussions as "crucial" (Pet. Br., p. 45) and to a particular meeting on January 20, 1954, as both "crucial" (Pet. Br., p. 13) and "important" (Pet. Br., p. 22). These assertions are to be contrasted with the findings that these meetings were, as the record shows, mere "exploratory discussions" (F. 45, R. 70). And the one of January 20 was one in which Wenzell was expressly found to have sat mute (F. 52, R. 75).

unbowed. Besides, *admittedly* every act now pleaded to impugn the contract, as the opinion of the court also well recounts, was 'begun, continued and ended' in good faith and in the full knowledge of the Government. *In truth there was no imposture*" (R. 31).*

On petitioner's own theory, the duty to pay the amounts owed under this contract cannot be avoided except by a determination that there was a violation by Wenzell of 18 U. S. C. 434, a penal statute containing no reference to the enforceability of contracts, and a further determination that this violation somehow bars recovery by the respondent. In light of this, it is extremely important to consider the facts as found by the court below rather than exhortations and generalities as to the validity and necessity of conflict-of-interest statutes—matters as to which there is no controversy.

For this reason we have deemed it necessary to set forth below those controlling facts which demonstrate, without more, that there was no violation of 18 U. S. C. 434 which could invalidate the contract.

II. Controlling Facts.

A. Wenzell had nothing to do with the origin of the contract or with the decision by either sponsoring company to participate in the power arrangements proposed by the Administration.

The origin of the contract has been accurately stated by petitioner at pages 4-5 of its brief under the heading "The Purpose of the Contract."

It is undisputed that Wenzell had nothing to do with the determination of general Administration policy or the specific decisions relating to the origin of the contract as

---

* Emphasis supplied throughout the brief unless otherwise indicated.

set forth in petitioner's brief at pages 4-5. These policies and decisions were made either prior to his 1953 consultancy (F. 22, R. 56-57) or during a time when Wenzell had no contact with any representative of either the sponsors or the petitioner (Fs. 33, 34, 36, 37, 38, 40, 41, 43, 44, 45, 51, R. 62-63, 64-65, 66, 67-68, 69, 70, 73-75).

Furthermore, insofar as Wenzell's 1953 Budget Bureau consultancy was concerned, he was not consulted on any policy matters connected with the Budget Bureau in 1953 (F. 33, R. 62-63). As petitioner states, the recommendations in his study "were not a factor in the decision by the Budget Bureau that AEC should seek a contract with private utility companies" (Pet. Br., p. 10, Fs. 33, 34, R. 62-63).

Wenzell had no connection with the decision by either sponsoring company to participate in the power arrangements proposed by the Administration (Fs. 39, 43-44, 65-66, 140, R. 66-67, 69-70, 80-81, 124-25).

B. Wenzell's activities as a Budget Bureau consultant related primarily to the February 25 proposal, which was rejected by the Government shortly after Wenzell's active participation as a Government consultant ended.

1. The only concern of the Budget Bureau in connection with the project was to determine as quickly as possible whether a proposal was possible which would meet the Bureau's fiscal standards. From the beginning it was decided that the AEC would be the contracting and, therefore, the negotiating agency.

Wenzell acted as a consultant only to the Budget Bureau. Thus, his activities as such consultant must be considered in the light of the nature of the Budget Bureau's interest in the project. The Findings state that the function of the Budget Bureau in connection with the project in 1954 was to determine whether "(1) the cost of the power to be con-

tracted for by AEC would be reasonable in relation to the cost of other power used by AEC, and (2) the cost of power under any proposal could be reconciled with the estimated cost of power from the proposed TVA Fulton plant, taking into account the cost of interest and taxes paid by the private companies" (F. 45, R. 70). Thus, the only concern of the Budget Bureau was that any proposal meet its fiscal standards.

Prior to the time when Wenzell had his first discussion with Hughes about this project in the middle of January, 1954, petitioner had decided that the AEC was to be the contracting agency (F. 45, R. 70). As such, of course, the AEC was to be the one responsible for negotiating any contract, and Wenzell was never an agent, employee or consultant of the AEC. The Findings state:

> "The evidence shows that from December 2, 1953 (the date on which Dodge first discussed the proposed project with Strauss), until the Power Contract was signed, the defendant never changed its decision that the AEC was to be the contracting agency for the generating plant" (F. 51, R. 74-75).

Many months later, it was the AEC's "team of negotiators" who began "negotiation of the contract" on July 7, 1954. It was the AEC's "competent and aggressive staff of negotiators" who participated in the "lengthy, arduous, and hotly contested" negotiating sessions lasting from July 7, 1954, to November 11, 1954 (F. 133, R. 120).

2. Wenzell's activities as a Budget Bureau consultant prior to the submission of the February 25 proposal "related primarily to the cost of money" and, secondarily, to staying in touch with the sponsors as a kind of "expediter."

Petitioner agrees that "during the period the Government and the sponsors were developing the proposal of

February 25th * * * Wenzell's assignment as a consultant related primarily to the cost of money (F. 74, R. 89)" (Pet. Br., p. 12).*

The Findings set forth Wenzell's duties and activities as a consultant:

> "Wenzell was to assist the Bureau again as a part-time consultant during the exploratory discussions on the project, particularly with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs" (F. 45, R. 70).

Although, as petitioner states, "Wenzell's assignment as a consultant related primarily to the cost of money," during the period prior to submission of the February 25 proposal Wenzell was also requested by Hughes to act as a kind of "expediter" (F. 46, R. 71). Petitioner states that Wenzell "helped formulate" the February 25 proposal (Pet. Br., p. 46). There is no finding and there is nothing in the record to the effect that Wenzell had anything to do with the "formulation" of the February 25 proposal, or any other proposal. It was specifically found that "Wenzell did not participate in the drafting of the proposal" (F. 66, R. 81). Giving an opinion of estimated interest costs and impressing the sponsors with the need for prompt action on the matter, which is petitioner's own summary of Wenzell's activities in connection with the development of the February 25 proposal, certainly do not constitute "formulating" a proposal. At pages 11 and 12 of peti-

* Illustrative of how far the argument in petitioner's brief is removed from its "Statement" is the radically different statement, at page 44 of petitioner's brief, in connection with this period of Wenzell's activities, that "He was a significant Government negotiator * * *."

tioner's brief, Wenzell's activities in this connection are accurately described:

> "After learning that Wenzell knew both Dixon and McAfee, Hughes asked Wenzell to attend, on behalf of the Budget Bureau the meeting scheduled for January 20 * * * and to use such influence as he had with the private utility people to impress upon them the need for prompt action (F. 46, R. 71).
> * * *
>
> "Wenzell had been asked by Assistant Director Hughes to stay in touch with Dixon and his associates on the development of a proposal and, particularly, to help point up the real cost of money to be used in financing the project (F. 55, R. 76). He advised both Hughes and the Dixon group on this matter throughout the period of his service (F. 55, R. 76)" (Pet. Br., pp. 11-12).

The Budget Bureau had to determine as quickly as possible whether a proposal could meet its fiscal standards and was sufficiently feasible to justify the Bureau's previous elimination from the budget of the appropriation for the construction of the proposed Fulton plant by the TVA (Fs. 37, 40, 45, R. 64, 67, 70). It was only in connection with this preliminary exploratory phase that Wenzell acted to encourage the sponsors to submit a proposal. This had nothing to do with negotiating, as petitioner tries to imply in its Argument.

The information that Wenzell obtained from First Boston regarding its estimate of the probable cost of debt money, was merely an estimate of what the interest rate would be if the market remained as it then was. The actual rate was to be—and was—determined by negotiations with lenders. "The cost of money * * * is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market"

(F. 102, R. 104). These facts illuminate the absurdity of the statements throughout petitioner's brief which sound as if Wenzell in some way determined by his own *ipse dixit* the price at which over $100,000,000 could be borrowed. No banking house has a monopoly upon money market information. They all constantly watch its ups and downs. When asked for probable money rates, they come up with almost identical ones; in this case the various banking houses consulted did give identical information—3½% (Fs. 62, 101, R. 79, 103). This is to be expected. Banking houses make competitive bids for bonds almost daily and their bids differ by very slight amounts.*

---

* For example, The Wall Street Journal reports recent competitive bidding for debt security issues showing minute variations in annual costs between the high and low bids as follows:

Date of Wall St. Journal (all 1960)	Issue	Number of Bids	Difference in Annual Interest Cost Between High and Low Bid
August 24	—Southern California Edison Company, $60,000,000 of 25 year first and refunding mortgage bonds, non-refundable for first five years.	3	.0154%
August 3	—Southwestern Bell Telephone Company, $100,000,000 of 35 year debentures.	2	.0190%
July 27	—Southern Counties Gas Company, $23,000,000 of 25 year first mortgage bonds, non-refundable during first five years.	5	.0439%
July 13	—Central Illinois Electric & Gas Company, $10,000,000 of 30 year first mortgage bonds.	7	.0684%
July 8	—Gulf Power Company, $5,000,000 of 30 year first mortgage bonds.	4	.0540%
July 7	—Illinois Bell Telephone Company, $50,000,000 of 37 year first mortgage bonds.	3	.0383%

Petitioner states that Wenzell's activities in connection with the February 25 proposal were "decidedly significant—particularly in the inquiry into the leading element of money costs" (Pet. Br., pp. 46-47). It is important to bear in mind that what was under consideration was merely a probable interest rate, binding on no one. As the court found (F. 102, R. 103-04), both respondent and petitioner made it exceedingly clear to each other that the estimate of a cost of 3½% for debt money would not be accepted as binding for the purpose of whatever contract might be negotiated, but that the terms of any such contract would have to be based on whatever the actual cost of such money turned out to be. This actual cost turned out to be not 3½%, but approximately 3.58% (F. 114, R. 112).

There is not the slightest evidence that the February 24th draft of interest rate opinion or the final version of April 14th was ever considered by anyone in connection with the actual financial arrangements, and it is ludicrous to suppose it would have been. The institutional investors were not concerned with First Boston's prediction, some months before, of what the interest rate would probably be; they were concerned with the actual interest rate they could get for their money in the then market.

3. All Wenzell's activities in connection with the February 25 proposal, including those relating to the sponsors and First Boston, were part of his assigned job as a Budget Bureau consultant.

Wenzell's activities in connection with the February 25 proposal—conveying to the sponsors advice regarding the probable cost of money, attending meetings in New York and Washington where the project was being discussed by the sponsors and others, and encouraging the sponsors to get a proposal in and to do it soon—were all

part of the job which Hughes had assigned to Wenzell (Fs. 46, 54, 55, 57, 61, 64, 65, R. 71, 75, 76, 79, 80). The affirmative findings are that two of the sponsors' representatives made the calculations used in the preparation of the proposal and that Wenzell did not participate in its drafting (F. 66, R. 81).

Moreover, it was not merely known to Hughes that Wenzell was to get information from First Boston as to the probable interest cost of the debt securities; it was suggested by Hughes that Wenzell do so (Fs. 59, 60, 67, R. 77, 78, 82). That Wenzell was conveying this information to the sponsors, just as he was conveying it to the Budget Bureau, was also in accordance with Hughes' specific instructions, so that both the sponsors and the Budget Bureau "would be talking about one and the same factor" (F. 66, R. 81).

At page 43 of its brief, in the argument portion, petitioner states that Wenzell "was retained as an expert consultant for the Budget Bureau and acted as such; he himself informed members of the Dixon-Yates staff that he was at their service as a representative of that agency (F. 55, R. 76)." Petitioner tries to create the impression that Wenzell told members of the Dixon-Yates staff that he was at their service as a representative of that agency in a general capacity. The finding was, as is accurately stated by petitioner in the first half of its brief, that Wenzell met with members of Dixon's staff on January 27, 1954, and "told them that he was at their service as a representative of the Budget Bureau on the matter of the cost of money needed to finance the plan" (Pet. Br., p. 15).

As the court below stated: "At the stage of the proceedings during which he [Wenzell] was employed by the Bureau of the Budget, there were no secrets" (R. 13). Or as Judge Bryan said in his concurring opinion, the Government would, with the doctrine denouncing duplicity in

agency, "condemn its own agent for pursuing aboveboard the honest directions of his Government" (R. 31).

4. Wenzell's active participation as a Budget Bureau consultant ended just prior to the time petitioner rejected the February 25 proposal on the basis of analyses by Adams and staffs of the AEC and TVA.

After the February 25 proposal was filed, Wenzell's "function related principally to the total cost of the project (F. 74, R. 89)" (Pet. Br., p. 12), a subject upon which he repeatedly protested his lack of qualification and upon which Adams of the FPC was called in as an advisor by the Bureau on March 19 (Fs. 74, 85, 89, R. 89, 97-98).

As petitioner relates, on March 24, as a result of the analyses of the February 25 proposal by Adams of the FPC and the staffs of the AEC and the TVA, "the sponsors were flatly informed that the cost estimates contained in their proposal were too high to form a basis for serious consideration by the Government (F. 84, 93, R. 94, 99)" (Pet. Br., p. 45).

Petitioner alleges that Wenzell's activities in connection with "the general intra-government analyses of Dixon-Yates' cost estimates" of the February 25 proposal* were "decidedly significant" (Pet. Br., pp. 46-47). Since the February 25 proposal was rejected and found not to be an acceptable basis for the negotiation of a contract (Pet. Br., pp. 14-15, F. 95, R. 100), it is apparent that the only "decidedly significant" effect the activities of Wenzell may have had in connection with the February 25 proposal was the rejection of that proposal. In fact, although Wenzell

* Petitioner does not actually label the proposal which it discusses in this part of its brief as the "February 25" proposal. The reference must be to that proposal, however, because Wenzell did not participate in any general intra-government analyses of cost estimates relating to the April 10 proposal. These were not made until after Wenzell's consultancy had been concluded (Fs. 100, 106, 129, R. 102, 106, 118).

admitted he was not qualified to advise on overall costs, he expressed the opinion to the Bureau "that the estimates of costs in the February 25 proposal were too high" (F. 74, R. 89).

The unanimous Findings show that as early as March 1 Wenzell stated to his superiors in the Budget Bureau that he could not analyze costs as they might be affected by power engineering (F. 74, R. 89). On March 9 he stated to the then Director of the Budget Bureau, Dodge, that "he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Fs. 85, 89, R. 95, 97-98). He reiterated this suggestion on March 15 (F. 89, R. 97-98).

March 16, 1954, really marked the end of Wenzell's active participation as a Budget Bureau consultant (Fs. 92, 94, R. 99). Adams began acting as a technical consultant to the Bureau on March 19, 1954 (F. 91, R. 98-99). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell "'to make sure that he (Wenzell) had turned everything over to Adams'" (F. 92, R. 99). The next day "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (F. 92, R. 99).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Fs. 94, 97, 98, R. 99-101).*

---

* Petitioner's brief (p. 47) says that Wenzell "participated" in the April 3 meeting. The only participation shown (F. 97, R. 100-01) is that he appears once again to have given the same information about probable interest costs. It is significant that with so many cooperative Government witnesses, petitioner was unable to show that Wenzell ever really did anything specific except deliver the First Boston prediction of financial weather and carry messages for Hughes.

"Since Adams had been called in by the Bureau to advise it on the cost of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954" (F. 94, R. 99).

It was not until after March 23, as petitioner itself recognizes, that:

> "The sponsors then began to develop a new proposal which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, R. 100, 102, 103). After modifying the proposal in the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, R. 104, 106)" (Pet. Br., p. 7).

C. Wenzell did nothing as a Bureau consultant with respect to the April 10 proposal except to confirm the information on the probable cost of money.

1. Wenzell's consultancy ended before the sponsors even began to draft the April 10 proposal and his only activities relating thereto were to confirm advice theretofore given on the probable cost of money.

As stated above, after March 16, Wenzell as a Budget Bureau consultant had only a few more telephone calls on the project and made only one more trip to Washington—on April 3—at the request of the Bureau. On that date he "confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money" (F. 97, R. 100-01). This was Wenzell's only activity in connection with the April 10 proposal.

The unanimous Findings show that after April 3 Wenzell ceased to serve as a consultant to the Bureau and performed no further services for the petitioner (Fs. 74, 98, 106, R. 89, 101, 106). It was not until three days later, on April 6,

1954, that the sponsors gave to the Government a general outline of the second proposal about which they were then thinking (F. 100, R. 102). Wenzell had nothing to do either with this outline or with the subsequent drafting of the proposal (F. 104, R. 105).

Petitioner states that the "sponsors submitted tentative drafts of their two proposals to the AEC and the Budget Bureau before submitting their formal offers. Wenzell participated in meetings with the AEC and the Budget Bureau at which tentative drafts of the first and second proposals, and the final version of the first proposal, were analyzed and reviewed" (Pet. Br., pp. 13-14). This is not so. As shown above, the sponsors did not even submit a "general outline" of their second proposal until April 6. Not until April 8 did the sponsors present a draft of their second proposal to a meeting attended by AEC and Budget Bureau representatives (F. 100, R. 102-03). Since Wenzell was not in Washington after April 3 (F. 98, R. 101), he could not have participated in meetings with the AEC and the Budget Bureau at which a tentative draft of the second proposal was analyzed.

Wenzell did not participate in any of the meetings where the basic cost estimates for the April 10 proposal were prepared (F. 95, R. 100); nor did he participate in the drafting of that proposal (F. 104, R. 105). His only function after April 3, 1954, and before the proposal was submitted to the petitioner, when he was of course no longer a Budget Bureau consultant, had to do with obtaining the judgment of First Boston on the current probable cost of the required debt money (F. 104, R. 105-06). The ultimate and different money costs which were the basis of figures in the contract were not agreed to by petitioner until, during the negotiation of the contract itself, respondent had obtained commit-

ments from purchasers of the debt securities and the cost of the debt money had been thereby removed from the uncertain realm of opinion—that of First Boston, Wenzell or anyone else—to the realm of actuality (Fs. 102, 114, R. 103-04, 111-12).

2. It was the April 10 proposal which later served as the basis for beginning negotiation of the contract —not the rejected February 25 proposal.

On June 30, 1954, three months after Wenzell's connection with the Government had ended, the AEC notified the sponsors that their proposal dated April 10, 1954, "constitutes a satisfactory basis for negotiation of a definitive contract. We are ready to begin negotiations" (F. 131, R. 119-20; see also Pet. Br., pp. 7, 8). Negotiations commenced July 7, 1954 (F. 133, R. 120).

Thus Wenzell's activities as a Bureau consultant related almost exclusively to a proposal which wound up in the wastebasket four months before the negotiation of the contract began. The proposal of April 10, the proposal with which Wenzell had nothing to do but confirm estimates previously given as to the probable cost of money, served as the basis for negotiating the contract.

There simply is no support in the Findings or in the record for petitioner's assertions that the second proposal "rested firmly upon the negotiations and analyses of the unsatisfactory first proposal" (Pet. Br., p. 47). On the contrary, the affirmative finding is (F. 104, R. 105):

> "The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal [all representatives of sponsors]. Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted."

Moreover, the April 10 proposal was basically and significantly a different type of proposal, all the information for which was developed by representatives of the sponsors (Fs. 93, 103, R. 99, 104). Whereas the first proposal, which was prepared under pressure, had been based upon adaptations of other studies, including comparisons with TVA estimated costs for its Fulton plant,* the new proposal was based upon new basic estimates. It is true that a Government representative made the request that such new basic estimates for the cost of constructing a plant and other facilities should be prepared, but Adams of the Federal Power Commission was that representative (F. 93, R. 99). These new basic estimates were prepared by representatives of the sponsors, together with an independent engineering firm, and "were used as a basis for the sponsors' proposal of April 10, 1954" (F. 95, R. 100).

By combining and confusing the findings with respect to the two proposals, petitioner creates the erroneous impression that Wenzell was an active consultant on the proposal which constituted the basis for negotiation of the contract. For example, petitioner states:

> "It follows that Wenzell's absence from the negotiation of the formal contract, after the proposal in which he participated was accepted as the basis for further negotiation, did not take him out of the statute's reach. As we have indicated, the statute's broad terms apply during the preparatory negotia-

---

* The fact that the February 25 proposal was based in part upon comparisons with TVA estimated costs was frankly and openly stated in that proposal (F. 103, R. 104). There is no other reason why the sponsors, along with representatives of the Budget Bureau, looked at certain financial data regarding TVA which was not available to the general public; and the reference to this on page 13 of petitioner's brief is pure red herring, having nothing to do with the conflict-of-interest issue.

tions which normally mold the final contract" (Pet. Br., p. 48).

Such ambiguity and confusion avoid the significance of the facts. Wenzell's activities as a Bureau consultant related almost exclusively to the February 25 proposal, which was rejected. His only activity in connection with the April 10 proposal was to confirm estimates of the probable cost of money—estimates which both parties had disavowed as controlling if a contract should be negotiated. And, it was the April 10 proposal—not the February 25 proposal—which was the starting point for negotiating the contract (F. 131, R. 119-20).

The absence of any causal relationship between what Wenzell did and the contract is even more apparent in light of the finding that "The Power Contract resulted from the following:" (a) submission to the AEC of the April 10 proposal; (b) the advice from the AEC on June 30 that the proposal constituted a satisfactory basis for the negotiation of a definitive contract and that the AEC was ready to begin negotiations; and (c) the commencement of negotiations on July 7, which terminated with the signing of the power contract on November 11, 1954 (F. 3, R. 49-50).

Petitioner's brief is misleading in its references to the proposals made by the sponsors as if they were offers the acceptance of which would result in a contract. For example, the heading on page 5 refers to a "firm" proposal. On page 28 there is a reference to "a proposal which would furnish an acceptable basis for a contract." The same phrase appears again on page 44. On page 47 this deception has grown into the "accepted proposal."

Neither proposal was an "offer" in the sense in which that term appears in "offer and acceptance" as used in contract law. As is demonstrated by what actually hap-

pened, the April 10 proposal was never regarded as anything but a basis or starting point for the negotiation of a contract.

D. Wenzell's activities as a Budget Bureau consultant are both *de minimis* and irrelevant and immaterial, because he did nothing of any significance in connection with the contract upon which suit was brought and judgment entered.

Whatever influence Wenzell had as a Budget Bureau consultant—and there is no finding that it was significant—related only to the February 25 proposal. It is clear from the Findings that he had nothing whatever to do with the reviews and analyses of the April 10 proposal, the decision to begin the negotiation of the contract, the negotiation of the contract, or the extensive reviews and analyses of the contract before it was finally executed (Fs. 129-136, R. 118-22). Petitioner contends that these facts should not make 18 U. S. C. 434 inapplicable because "interested Government representatives could exert *significant influence* over the transaction in which they were participating, and yet escape responsibility under the statute by resigning before the final contract was signed" (Pet. Br., p. 29).

Wenzell, however, did not assert *any* influence, let alone any *significant influence*, over the transaction in suit here, *i.e.*, the contract. This fact alone makes the statute inapplicable in this case even under petitioner's conception of the statute.

Wenzell's activities in connection with the February 25 proposal are in their proper perspective when their unimportance initially is realized and when, in addition, they are filtered through (1) the rejection by petitioner of the February 25 proposal and the independent formulation

by the sponsors of the essentially different April 10 proposal; (2) the independent review of the latter proposal by representatives of TVA and AEC and Adams of the FPC, and the independent comparison of such proposal and that received from the Von Tresckow group;ø (3) the three months which elapsed between the end of Wenzell's activities and the Government's independent decision to begin negotiating a contract; (4) the more than seven months which elapsed between the end of his activities and the execution of a contract; (5) "the lengthy, arduous and hotly contested" negotiations of the contract by "a competent and aggressive staff of negotiators" representing the Government,* and (6) the direct and decisive action regarding the contract taken by the President,** the Commissioners of the AEC and other high officials of that Commission, the Attorney General and the Department of Justice generally,† the Federal Power Commission,†† the TVA,# the Comptroller General's Office,## the SEC and its Staff,§ the General Counsel of the AEC,§§ and the Joint Committee on Atomic

ø Fs. 129, 130, R. 118-19.

* F. 133, R. 120-21.

** Fs. 22, 130, 152(b), R. 56-57, 119, 141.

† Fs. 150, 152(b) and (e), 173(c), 203(c), R. 138, 141-43, 158-60, 190.

†† Fs. 85, 92, 93, 94, 95, 96, 97, 100, 102, 135, R. 95, 99-100, 102, 103, 122.

Fs. 38, 84, 89, 129, 135, 149, 154, R. 66, 94, 97, 118-19, 122, 137-38.

Fs. 152(a), (c) and (d), 173(e), 203(b), R. 140-42, 161, 190.

§ Fs. 152(f), 173, R. 143, 157, *Matter of Mississippi Valley Generating Company*, 36 S. E. C. 159 (1955).

§§ Fs. 152(g), 173(d), 203(a), R. 143, 160, 187-90.

Energy of the Congress.* Indeed Congress itself enacted Section 164 of the Atomic Energy Act of 1954 primarily for the purpose of authorizing this contract.**

In this connection, petitioner's brief is marked by a sly and deceptive use of the adjectives "formal," "firm," "final" and "express" relative to the contract, to give the impression that there were two contracts here: one an informal contract and the other the formal, written contract. For example, "formal" appears before "contract" in petitioner's brief on pages 8, 9, 25, 28 (three times), 29 (twice), 34, 35 (twice), 46 (twice) and 48. On page 50 this word is even interpolated into a quotation from Judge Madden's opinion. There is a "firm" contract spoken of on page 9 and an "express" contract on page 31. There is a "final" contract on pages 7, 29 (twice), 46, 47, 48 and 52 (ftn.).

There was no contract, understanding or other arrangement, legally or morally binding upon either party, formal, informal, express, implied or otherwise, until the signatures were put to the printed document on November 11, 1954. As late as November 10, 1954, the day before the contract was signed, "it was doubtful whether there would be a contract" (F. 133, R. 120-21).† There is nothing in the Findings to the contrary.

---

* Fs. 134, 167, 168, 169, 170, 171, R. 121, 155-56.

** *Legislative History of the Atomic Energy Act of 1954* (*Public Law* 703, 83d Cong.), U. S. Atomic Energy Commission, Vols. I, II and III (Washington, 1956); see *e.g.*, Vol. III, p. 3250 *et seq.*

† The reference to November *19* in the record is an obvious misprint and should be November *10*. See Appendix to Petition for Writ of Certiorari herein, p. 158.

1. Petitioner did not even decide to commence contract negotiations until approximately two and one-half months after Wenzell's Bureau consultancy ended and only after petitioner made an intensive review of the April 10 proposal and of a competing proposal submitted by the Von Tresckow group.

After Wenzell left the Government on April 3, 1954, an intensive review and analysis of the April 10 proposal was made by TVA and AEC, with Adams of the Federal Power Commission participating for the Budget Bureau (F. 129, R. 118-119). A competing proposal was made by a group headed by Von Tresckow on May 27, 1954. This was analyzed on a comparative basis with the April 10 proposal and with the estimated TVA costs for the Fulton plant (Fs. 129, 130, R. 118, 119).

It was not until June 16, 1954, two and one-half months after Wenzell left the Government, that a decision was made by the President to instruct the AEC to commence negotiations with the respondent on the basis of the April 10 proposal of the sponsors. "Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors" (F. 130, R. 119).*

The sponsors did not know of this decision until June 30, 1954 (F. 131, R. 119-120). The AEC's notification to the sponsors of its willingness to begin negotiations "was not an acceptance; it was simply a statement that AEC

---

* Compare the reference in petitioner's brief (p. 4), to "closed negotiations with a selected business entity." This is either irrelevant or false. If it refers to a selection and closed sessions after Wenzell left the Government, it is irrelevant. If it refers to the time prior to his leaving the Government, it is false, as the draftsman of the brief knew. For he showed by his statement on page 8 regarding the Von Tresckow proposal that nothing was closed and nothing was decided until June 16, long after Wenzell had left.

was ready to begin contract negotiations" (F. 131, R. 119-120).

There is no dispute that Wenzell, having previously left the Bureau, had nothing whatever to do with any of these analyses, reviews, and deliberations, or with the President's decision.

2. Wenzell had nothing to do with the "lengthy, arduous and hotly contested" negotiations between the AEC and respondent beginning on July 7, 1954, and concluding on November 11, 1954—over seven months after Wenzell's Budget Bureau consultancy terminated.

As has been shown, Wenzell's only function regarding the April 10 proposal was to confirm the First Boston opinion as to the estimated interest rate for debt money. But, even if Wenzell did have this slight contact with the April 10 proposal, he had no contact whatever with the contract itself, and the contract was a document far different from the proposal.

The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954. The negotiating sessions were "lengthy, arduous and hotly contested." There were 15 formal sessions for which minutes were kept and additional informal sessions (F. 133, R. 120).

Petitioner was represented by an AEC team of negotiators with a total of 14 different people taking part in this team. "They were a competent and aggressive staff of negotiators" (F. 133, R. 120).

Nine successive proofs of the proposed contract were printed to incorporate revisions developed in the negotiations. The contract, with related appendices and an interpretative memorandum, was worked out word by word to the extent of 69 printed pages. This contrasts sharply

with the April 10 proposal of only nine typewritten pages (Fs. 133, 134, R. 120-21).

The General Manager of the AEC reported to the Joint Committee on Atomic Energy of the Congress that the contract contained 25 provisions which were improvements over the terms of the April 10 proposal from the standpoint of the AEC, and that the contract contained a number of other items which were major concessions to the petitioner (F. 134, R. 121).

During this period, the AEC furnished proofs of the proposed contract from time to time to the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. Joint meetings were held between the AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times, the Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Proofs of the contract were likewise made available to TVA, and after meetings between representatives of the AEC and TVA, a number of the TVA suggestions were incorporated verbatim in the contract (F. 135, R. 122).

Despite all these extensive negotiations and consultations, as late as November 10, 1954, the Government insisted on two new major contract provisions, and it was doubtful whether there would have been a contract unless the sponsors' representatives had agreed to these requests (F. 133, R. 120-21).*

The contract grew out of these negotiating sessions—and only out of them—and the finding is specific that Wenzell did not participate in them.

Despite its statement that "even a person merely in an advisory position is affected by the rule" (Pet. Br., p. 50), petitioner obviously realizes it must somehow make

---

* See footnote †, *supra*, p. 28.

Wenzell a "negotiator" to bring him within the scope of § 434. Otherwise, why would petitioner find it necessary to use the words "negotiator," "negotiations" and "negotiating" at least 20 times in its attempt to establish that Wenzell somehow acted "as an officer or agent of the United States for the transaction of business with respondent's organizers" (Pet. Br., pp. 42-50). But the finding is:

> "Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).

3. The "Power Contract was negotiated, executed, and has been administered with an extraordinary measure of disclosure to the Congress and the public."*

The proposed contract was the subject of extensive debates, Committee Reports, and resolutions in both Houses of Congress prior to its execution. As stated above, a section was included in the Atomic Energy Act of 1954 specifically to authorize this very contract (See Fs. 148, 152, R. 137, 140-143). Prior to its execution the proposed contract was the subject of Congressional hearings.**

---

* "Brief for the United States as *Amicus Curiae*" filed with the Court of Appeals for the District of Columbia on the appeal from the SEC order approving respondent's equity financing for the performance of this contract. See references thereto in Fs. 152(e), 173(e), and 203(e), R. 142-143, 158-160, 190. This brief was signed by the Assistant Attorney General of the United States, and by three attorneys of the Department of Justice. Of counsel were the General Counsel of the AEC and another attorney for the AEC.

** *E. g.*, Hearings before the Joint Committee on Atomic Energy on S. 3323 and H. R. 8862, 83d Cong., 2d Sess., Part II, at 945-1122 (1954); Hearings before a Subcommittee of the Committee on the Judiciary, *Power Policy, Dixon-Yates Contract*, 83d Cong., 2d Sess., Part I, 1-183 (1954); and Hearings before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess., *Exercise of Statutory Requirements under Section 164, Atomic Energy Act of 1954*).

Furthermore, the April 10 proposal itself was printed in the Congressional Record on July 14, 1954. Various proofs of the contract and the contract itself were reviewed by a Congressional Committee prior to its effectiveness. For example, on August 18, 1954, Nichols, General Manager of the AEC, sent the Chairman of the Joint Committee on Atomic Energy of the Congress a copy of the sixth proof of the contract dated August 11, 1954 (F. 167, R. 155). On November 11, 1954, the AEC sent the Joint Committee an executed copy of the contract and its supplements, the interpretive memorandum, the letter contract between the sponsors and AEC, a copy of the opinion of the General Counsel of AEC, and two letters from respondent regarding the execution and delivery of the contract (F. 170, R. 156); and thereafter the contract became effective because of affirmative action by the Joint Committee (Fs. 165-173, R. 154-61).

On October 6, 1954, the Acting Chairman of the AEC wrote the Chairman of the Joint Committee regarding the October 1 proof of the proposed contract. The writer reported that before the draft was approved, the AEC had favorable letters from the Federal Power Commission, the General Accounting Office, TVA, the Bureau of the Budget, the Chief of Engineers, and an opinion from the General Counsel of the AEC (F. 168, R. 155).

Furthermore, the Acting Comptroller General submitted opinions to the AEC on October 5 and December 13 to the effect that the AEC had the authority and power to execute the contract and perform the obligations thereby imposed upon it pursuant to the provisions of the contract (Fs. 6, 7(c), 152[a], 152[c], R. 50-51, 140-141, 142). By authorization of the President, the Attorney General of the United States furnished Chairman Strauss of the AEC an opinion on October 20, 1954, respecting the validity of the proposed power contract (F. 152[b], R. 141). On October 12, 1954, the Acting Comptroller General advised the Chairman of

the Joint Committee on Atomic Energy that the execution of the proposed contract was authorized by Section 164 of the Atomic Energy Act of 1954, and that the contract complied with all statutory requirements applicable to its execution by AEC (F. 152[d], R. 142). On November 11, 1954 the General Counsel of the AEC delivered to respondent an opinion to the effect that the AEC had the power and authority to execute the contract and the undertakings therein described and to obligate the United States for all payments which may be required to be made by the AEC to respondent pursuant to any of the provisions thereof (Fs. 6, 7[a], R. 50-51).

E. First Boston was retained as one of MVG's financial agents only after Wenzell's Budget Bureau consultancy ended, and there was no agreement or understanding relating to such retainer prior to that time.

1. During the period of Wenzell's Government consultancy there was no understanding or agreement of any kind regarding the retention of First Boston as MVG's financial agent.

Petitioner's brief (p. 56) says that, prior to Wenzell's leaving the Government, First Boston did not have an "outright commitment" regarding the financing.

The court below said:

> "There is not a shadow of evidence that [during the time Wenzell was a Budget Bureau consultant] it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of

the corporation which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding" (R. 20).

That the sponsors did not even feel they were somehow under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came in May to make arrangements for the financing of the hoped-for project,

> "Dixon felt perfectly free to place 40 percent of the financing business with Lehman Brothers, and would, apparently, have felt perfectly free to place all of it elsewhere than with First Boston, if he had so desired" (R. 15; see also R. 16, 20).

2. First Boston was retained "for good business reasons" as one of MVG's financial agents, after Wenzell's Budget Bureau consultancy ended.

As shown above (*supra*, pp. 20-21), the active period of Wenzell's consultancy ended in the middle of March 1954 (Fs. 92, 94, R. 99-100). Thereafter, his Budget Bureau activities were confined to confirmations of estimates of money costs previously conveyed, to turning matters over to Adams, who began acting as a technical consultant to the Budget Bureau on March 19 (Fs. 91, 92, R. 98-99), and to a few final and desultory contacts, ending with his attendance at two meetings in Washington on April 3, 1954, at the request of the Budget Bureau (Fs. 94, 97-98, R. 99-101). It was unanimously found that Wenzell ceased to serve as a consultant to the Budget Bureau on April 3 (Fs. 55, 74, 106, R. 76, 89, 106).

First Boston was not retained as one of MVG's financial agents until almost two months after Wenzell's active period as a Budget Bureau consultant ended (March 16 to

May 12), and over one month after he ceased to serve as a consultant (April 3 to May 12).

Specifically, the findings are that as of May 7, 1954, Woods of First Boston "planned to use several of First Boston's officers as a small task force to prepare the memorandum [in which First Boston was to present to respondent its idea of an appropriate financing program] and to approach the banks and insurance companies *in the event* First Boston was retained to perform the service" (F. 112, R. 110-11). "Dixon introduced the idea at the meeting [of May 7, 1954] that *if* First Boston was to arrange for the financing he would like to have Lehman Brothers associated with First Boston in the undertaking" (F. 112, R. 110-11). "However, the consummation of an agreement between the sponsors and First Boston was delayed when Dixon stated on May 7 that he would like to have Lehman Brothers associated with First Boston on the task of raising the money" (F. 116, R. 113). "On May 19, 1954, Woods issued to certain First Boston personnel a memorandum setting forth the agreement he had concluded with Dixon on or about May 12, 1954, regarding First Boston's association with Lehman Brothers in the financing arrangements" (F. 115, R. 112-113). "There never was any written agreement of retainer, but the evidence shows that all questions were resolved by May 12, 1954, when Dixon and Woods agreed that First Boston and Lehman Brothers would act as financial agents for the sponsors" (F. 116, R. 113).

First Boston was retained as one of MVG's financial agents "for good business reasons" (R. 17-18) which were independent of Wenzell.

The court below found:

> "TVA is a very large supplier of electrical energy to the AEC. However, the AEC also purchases huge

amounts of energy from private suppliers. One of these suppliers is the Ohio Valley Electric Corporation (hereinafter designated as OVEC), composed of a group of private utilities which, in 1952, contracted with AEC to supply it with 1,800,000 kw. at Portsmouth, Ohio. This is one of the largest generating plants in the world, and a large amount of financing was required by the utilities that banded together to carry out this undertaking.

"First Boston was employed by OVEC to arrange for this financing, consisting of directly placing the securities of OVEC with large institutional investors" (F. 27, R. 59).

The reason for hiring First Boston was expressed as follows by respondent's counsel:

"James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project" (F. 68, R. 84).

As the court pointed out:

"There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract" (R. 14).

By constant repetition, petitioner attempts to give substance to its assertion that "it was Wenzell's own conduct which, in large part, made it so likely that First Boston would become the financial agent on the project" (Pet. Br., p. 57), rather than the fact of "First Boston's experience in arranging for the financing of the project for the Ohio Valley Electric Corporation" (dissenting opinion of Chief Judge Jones, R. 45). Similar assertions of peti-

tioner appear at pages 29, 51-52 and 59 of its brief. There is no support for these assertions.

Because there is no such support, petitioner resorts to distortions of the opinion of the court below and of the Findings. For example, petitioner states:

> "Wenzell's activities continually kept his company to the forefront of the negotiations so that by the 'logic of circumstances' (R. 16) it stood to receive the financial agency for the project and was, in fact, retained for this purpose long before the formal contract between the United States and respondent was negotiated" (Pet. Br., p. 29).

This is a misuse of a phrase from the majority opinion. The "logic of circumstances" to which the majority referred was First Boston's experience in arranging the financing of OVEC and not Wenzell's activities as a Bureau consultant (See R. 5, 12, 14, 17).

The support of petitioner's theory regarding Wenzell's conduct is itemized on pages 57-59 of its brief. An examination of each of the findings cited in these pages demonstrates that Wenzell engaged in the activities described by petitioner for a variety of reasons, none of which was to keep First Boston "to the forefront" in order to "advance [the] likelihood" that it would be retained as a financial agent in connection with the project. For example, petitioner recites that Wenzell brought Miller* to a meeting at the Budget Bureau on January 20, 1954, discussed the project at various times with Miller and obtained financial information from his firm as "a personal favor" for Dixon, and then petitioner baldly states: "It is not surprising therefore that by the latter part of the month Dixon and

PETITIONER

* ~~Respondent~~ inflates Miller's importance by calling him "a First Boston officer" (Pet. Br., p. 11) and "a First Boston vice-president" (Pet. Br., pp. 57-58). He was neither. He was "an assistant in First Boston's buying department" (F. 49, R. 72).

his counsel were talking in terms of giving First Boston first consideration as financial agent (F. 68, R. 84)" (Pet. Br., pp. 57-58). Yet, petitioner itself, in the first section of its brief, correctly states the unanimous finding relating to this particular conversation. Petitioner there states that Dixon and his counsel were discussing the fact "that, if it became necessary to finance the project, First Boston would receive first consideration for the financial agency because of its experience in the financing of the Ohio Valley Electric Company" (Pet. Br., p. 18).

F. Wenzell performed his duties as a Budget Bureau consultant faithfully, diligently and honestly.

It is of course conceded that Wenzell was not an officer, agent, member, employee or stockholder of respondent or its sponsors. Nor did he have any other legal relationship with the sponsors or MVG during the time he was a Government consultant. As shown above (*supra*, pp. 34-35), there was no agreement or understanding of any kind relating to the retention of First Boston as a financial agent during the time Wenzell was a Budget Bureau consultant.

It can be argued that Wenzell may have had some kind of a fugitive hope, but that is the extent of any valid argument based upon the facts before the Court. At best Wenzell might possibly have hoped that at some time in the future the President might determine to have the AEC commence negotiations with respondent; that after "a long period of negotiations" and "many preliminary approvals" (F. 85, R. 95) a contract might ultimately be signed; that, although Wenzell would have no interest in that contract, the contract would involve collateral financing for which a financial agent might be retained; and that First Boston, of which Wenzell was an officer, might be selected as that financial agent to negotiate the financing, not with the Government, but with private institutional investors.

It is undisputed that no improper motive influenced any action of Wenzell as a Government consultant and that in this capacity he exercised absolute loyalty and undivided allegiance to the best interests of the Government. As the Court below stated, Wenzell "served the Administration faithfully in the tasks assigned to him"; he "did what he was assigned to do, did nothing for the Dixon-Yates interest and received nothing from it" (R. 13, 14). Chief Judge Jones recognized in his dissenting opinion "the diligence with which Wenzell pursued his duties in the Budget Bureau" (R. 46; see also, opinion of Justice Reed at R. 32 and Pet. Br., pp. 29, 30, 59-60).

Petitioner repeatedly states that there was no need for it to show or prove actual corruption, fraud, dishonesty or loss to the Government in order to invalidate the contract. Indeed, it devotes an entire section of its brief to this topic (Pet. Br., pp. 71-74). Respondent concedes there is authority for this proposition. However, it is simply not relevant or material to this case. Petitioner conceded in the court below, not merely that it had failed to prove corruption, fraud, dishonesty or loss to the Government, but that there was in fact no corruption, fraud, dishonesty or loss to the Government in this case.

Petitioner's hypotheticals (*e. g.*, Pet. Br., pp. 51-52, 56, 60) and unjustified inferences as to the behavior of a public servant (*e. g.*, Pet. Br., pp. 29, 51-52, 57-59) are clearly unwarranted. Not only do they lack support in the record, but they are also inconsistent with petitioner's admission, as stated by Judge Bryan: "admittedly every act now pleaded to impugn the contract, as the opinion of the court also well recounts, was 'begun, continued and ended' in good faith and in the full knowledge of the Government. In truth there was no imposture" (R. 31).

Petitioner's position is well summarized by the court below:

> "The Government urges, in effect, that the doctrine which it calls to its defense is a prophylactic generalization which must be applied in cases of honest transactions in order to keep it available and effective in cases of dishonest transactions" (R. 21).

Also, in considering whatever hope Wenzell may have had as a possible conflicting interest, one must bear in mind that as events turned out First Boston did not take a fee. Promptly after it was retained two of its principal executive officers determined that there should be no fee (F. 117, R. 113, Pet. Br., p. 24). First Boston, therefore, had no pecuniary interest in the transaction and it would be impossible for Wenzell to have an indirect pecuniary interest through First Boston. The statement in petitioner's brief (p. 59, ftn. 17), that the matter was not finally settled until after Wenzell's activities had become a public issue, is not supported by the Findings. So far as First Boston is concerned, it is clear that this determination was made in May or June of 1954 and adhered to by that firm throughout (F. 117-121, R. 113-16). To say that the kudos of handling such a matter gave First Boston a pecuniary interest is absurd (Pet. Br., p. 24). No one could ever do a good job for the Government on that basis. Even a Government lawyer who tried a well publicized case would be deemed to have a personal pecuniary interest because he might subsequently go into private practice and get clients as a result.

SUMMARY OF ARGUMENT

This is essentially a fact case. It is therefore, important that the facts, as found, be correctly stated and understood in order to apply to them the applicable law.

The decision of the court below should be affirmed because—

1. That decision, on the facts as found, establishes a strict and demanding precedent requiring high standards of integrity and fidelity in the federal contracting process. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of the Government, to prevent the development of any conflict which might conceivably harm the Government in its dealings with private contractors. It protects the sanctity of honest Government contracts.

2. Wenzell, who is alleged by petitioner to have occupied a dual position, was not "an officer or agent of the United States for the transaction of business" within the meaning of 18 U.S.C. 434. He was an unpaid part-time consultant, principally on probable money costs, without authority to act for the United States or bind it in any way; nor did he attempt to do so. Petitioner failed to show that he attempted to indulge in any such negotiating activities, even though petitioner had available as witnesses all the numerous Government personnel who had anything to do with the proposals and the contract. He resigned all Government connections before the decision to negotiate was made by the Government and before negotiations started.

3. Wenzell was not "directly or indirectly interested" in the contract during the time he was a Budget Bureau

consultant. At most, he could have had a mere hope that if in the future, after many contingencies, negotiations should commence and the negotiating parties should reach an agreement, respondent might utilize a financial agent and, because of the leadership of First Boston in the type of financing involved, might retain that firm. The cases and other authorities show that such a hope does not constitute an "interest." Petitioner fails to distinguish between indirect interests on the one hand and remote interests on the other. By any standards, the possibility that Wenzell may have hoped that, way down the line in the future, there might be some business for First Boston, was too remote from the contract to constitute an interest. Moreover First Boston served without compensation and Wenzell could not, therefore, have any indirect pecuniary interest.

4. The issue here is not only whether Wenzell was guilty of violating 18 U. S. C. 434. The petitioner must also establish that, on the facts as found, public policy requires that this Court declare a concededly fair and honest contract unenforceable, not as against Wenzell or anyone claiming through him, but as against respondent. Congress deliberately omitted a sanction of unenforceability from 18 U. S. C. 434, and the cases show that this Court will not legislate by adding such a sanction. It will not declare contracts invalid for reasons of public policy unless (i) the alleged illegality is so inherent in the contract that it cannot be enforced without making the Court a party to the violation of law, (ii) enforcement would aid the wrongdoer in profiting from his own wrong, or (iii) a Government contracting officer purports to enter into a contract which he is forbidden by law to make. None of these elements is here present. The six cases under 18 U. S. C. 434 show

clearly that public policy requires enforcement in favor of respondent of its contract with the Government.

The standards of conduct for Government employees with incipient conflicts which have been prescribed by the Attorney General and other federal officials and agencies, require the doing of what was done in this case: Wenzell was removed from his Government consultancy before any conflict could arise. This was done as the direct consequence of action by respondent.

5. It was basic Administration policy that the Government should attempt to save over $100,000,000 in federal expenditures by securing the construction of a substitute for the TVA Fulton plant by some non-federal body. That objective was achieved as a direct result of the performance by respondent under the instant contract. Having enjoyed the benefit of that performance, petitioner can not now be permitted to avoid payment of its cost.

ARGUMENT.

I.

The decision of the court below, on the facts as found, establishes a demanding precedent within the letter and spirit of 18 U. S. C. 434, requiring the highest standards of integrity and fidelity in the federal contracting process.

Petitioner's entire case is bottomed on what the late Justice Holmes aptly referred to as the "parade of imaginary horribles"—the horrendous consequences which might follow if the decision of the court below is not reversed. Petitioner would have this Court believe that enforcement of the contract in this case will undermine

the universally recognized principle that "the federal contracting process demands the highest standards of integrity and fidelity," and "in a larger sense, weaken the moral standards of the Nation at large" (Pet. Br., pp. 33, 83). Upholding the decision below will somehow lower "the level of wholesomeness in Government procurement" and presumably impede its rise "toward the unattained ideals of integrity our society has set for itself" (Pet. Br., p. 82).

On a more mundane and specific level, petitioner predicts that contractors and Government officials will no longer "guard against conflicts-of-interest." Instead, there will be "acquiescence in conflicts" (Pet. Br., p. 33) and "contravention of the Congressional mandate in 18 U. S. C. 434 by complacent, ignorant or negligent officials, as well as by conniving or negligent double-agents" (Pet. Br., p. 80). Contractors will only "give lip service to the public policy against conflicts-of-interests" and will not even express a "faint objection" to conflicts of interest (Pet. Br., p. 81). Government representatives will be "encouraged to rely upon a makeshift morality which winks at violations of law as trivial" (Pet. Br., p. 83).

Such hyperbole might be warranted if this were a case in which this Court was being asked to enforce a contract involving the same "baneful tendencies" present in some of the cases cited by petitioner, such as those involving bribery, including two cases setting aside the infamous Teapot Dome leases which were obtained by direct bribery of the Secretary of Interior of the United States,* and agreements for contingent fees for obtaining contracts with the Government.** In the context of the facts of this case, it is wholly unjustified.

---

* *Pan American Co.* v. *United States*, 273 U. S. 456; *Mammoth Oil Co.* v. *United States*, 275 U. S. 13; Cf. *Crocker* v. *United States*, 240 U. S. 74; *United States* v. *Carter*, 217 U. S. 286; *The Michigan Steel Box Co.* v. *United States*, 49 Ct. Cl. 421 (1914).

** *Hazelton* v. *Sheckells*, 202 U. S. 71; *Tool Co.* v. *Norris*, 69 U. S. (2 Wall.) 45.

While giving effect to the policy enunciated by this Court in *Muschany* v. *United States, infra*, that "it is a matter of public importance that good faith contracts of the United States should not be lightly invalidated," the decision of the court below, on the facts as found, establishes a strict and demanding precedent, within the letter and spirit* of 18 U. S. C. 434, requiring the highest standards of integrity. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of Government, to prevent the possibility of any conflict which might conceivably harm the Government in its dealings with private contractors.

In order for any Government contractor to recover in some future suit against the United States on the basis of this case as a precedent, the record will have to meet the following tests:

1. There must not have been a shadow of evidence of any agreement, understanding or commitment, written or oral, formal or informal, contingent or otherwise, during the period of a person's employment as a Government consultant that the consultant's private employer would be retained as a subcontractor of a potential Government contractor.

2. The Government consultant must have served the Government faithfully and diligently in the tasks assigned to him, done nothing for the potential Government contractor apart from what his Government superior told him to do, and received nothing from such potential contractor.

---

* Petitioner insists upon what it believes is the letter of §434 and cites the New Testament (Matthew, vi, 24) (Pet. Br., p. 35). However, petitioner has turned its back upon the admonition by St. Paul regarding the New Testament:

> "not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life" (II Corinthians, iii, 6).

3. The Government consultant must not have been influenced in any of his actions by any improper motive.

4. There must have been full disclosure by the Government consultant and the potential Government contractor to the Government agency hiring the consultant of any possibility or likelihood that the Government consultant's private employer might be considered as a possible subcontractor of the potential Government contractor.

5. If there was any likelihood that the Government consultant's private employer might become a subcontractor of the potential Government contractor, the Government consultant must have finished his work promptly and turned it over to a qualified Government employee.

6. If there was a possibility that the Government consultant's private employer might be retained as a subcontractor by the potential Government contractor, his consultancy must have ceased prior to the decision of the Government to begin negotiations with the potential Government contractor and prior to completion of the negotiations by agreement upon the terms of the contract.

7. The Government contract itself must be an honest one, arrived at after hard and skillful bargaining by different and independent representatives of the Government.

8. The Government consultant must not have participated in any of the negotiating sessions or consulted with or advised any representatives of the private contractor or the Government during the period of negotiation.

9. Before the Government contract was executed and became effective, it must have been reviewed by all the governmental agencies having any interest in the matter or expertise to contribute.

10. The Government contract must have been the subject of extensive investigation by Congressional committees and debate in Congress, and its execution must have been authorized thereafter by legislation adopted for such purpose by Congress.

11. All transactions relating to the contract must have been honest. There must have been, in fact, no corruption, fraud, dishonesty, imposture or loss to the Government.

If all Government officials and contractors are guided in their relations with the Government by the rules of conduct approved by the holding of the court below, on the facts in this case, there will not be a "shadow of a doubt as to the integrity of Government contracts" (Pet. Br., p. 30) or the slightest "likelihood of disadvantage to the Government." *Muschany* v. *United States*, 324 U. S. 49, 66.

II.

Wenzell was not "an officer or agent of the United States for the transaction of business" in connection with the contract within the meaning of 18 U. S. C. 434.

That Wenzell was not an "officer" of the Government is clear. He took no oath of office; he had no tenure; he served without salary, except for $10 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary and were not prescribed by statute; and he was permitted to continue in his position as one of the vice presidents and directors of First Boston and to draw his salary from that company. That such a person cannot be an "officer" of the Government is well established.

United States v. *Hartwell*, 73 U. S. 385;
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514.

That he was not employed as an "agent of the United States for the transaction of business" is equally clear. It is elementary that an agent is one who is authorized to act for another in the contractual dealings of the latter with third persons. Mechem, *Outlines of the Law of Agency* § 12 (4th ed. 1952); Restatement (Second), *Agency* § 12 (1958). Nothing could be clearer, on the Findings, than that Wenzell never had, and never purported to exercise, any such authority.

Moreover in order to qualify Wenzell would have had to "transact" business. Transact means that he would have had "to prosecute negotiations; to carry on business; to have dealings; * * * to carry through; to bring about." *Webster's New International Dictionary* (2 ed.).

One of the authorities cited in petitioner's brief (pp. 36, 53) says that one of the elements necessary to prove a violation of §434 is:

> "a clear showing that such officer has been employed or has acted 'as an officer or agent of the United States for the transaction of business' with such corporation or entity. That element, too, presents a mixed question of fact and law, and its establishment will depend largely upon the factual showing made in each case as to the legal responsibilities of the officer concerned and the functions actually performed by him." *Compilation of Certain Memoranda Prepared by the Office of the Senate Legislative Counsel on Conflict of Interest Statutes*, Senate Committee on Armed Services, 84th Cong., 1st Sess. p. 20 (1955).

As the Findings demonstrate and as we have shown above (*supra*, pp. 8-23, 26-27), Wenzell's activities were not of such a character as to constitute transaction of business for the United States. He had no authority to negotiate, to carry on business dealings, or to bring about anything for

or on behalf of petitioner. There is no finding that he at any time sat down with representatives of the sponsors and negotiated, even with respect to their proposals. With the whole panoply of Government personnel who had anything to do with either the proposals or the contract available to petitioner as witnesses, it was unable to show that Wenzell ever said anything at any meeting except to disclaim his own qualifications as to overall costs, express the opinion that the estimates of costs in the February 25 proposal were too high, and contribute the First Boston opinion on the probable money market.

Moreover, Wenzell's activities were too remote from the contract to have any effect on it. His activities as a Budget Bureau consultant related almost exclusively to the rejected February 25 proposal (*supra*, p. 12, *et seq.*). And before Wenzell can have been held to have violated §434 as to this particular contract, it must have been found, not only that he had some sort of interest in the contract, but that he also transacted business as an officer or agent of the United States in connection with that contract.

Thus, in *Architects Building Corp.* v. *United States*, 98 Ct. Cl. 368 (1943), the court held that the Government official did not transact business within the meaning of 18 U. S. C. 434 because "his connection" with the contract negotiations was "so slight and minor that we do not think the interests of the Government could in any way have been affected" (98 Ct. Cl. at 379).*

---

* As petitioner points out, in *Ingalls* v. *Perkins*, 33 N. M. 269, 263 Pac. 761 (1927), the court held that the plaintiff's "interest was too remote to constitute a conflict under the statute" because "he had no influence over the assignment of patients to a particular institution" (Pet. Br., p. 71).

Similarly, the Attorney General in 40 Ops. Att'y Gen. 168, upon which petitioner relies, advised that certain persons might come within the prohibition of Section 434 because "the degree of relationship of the officer to the procurement process would be such as to constitute 'the transaction of business with such corporation' as used in the statute" (p. 170).

On the other hand, in *Rankin* v. *United States*, 98 Ct. Cl. 357 (1943), the Court of Claims held void a Government contract in which the Government official was interested because of the definite connection between the official's governmental activities and the contract:

> "He did not take merely a perfunctory part but was the prime mover to secure and retain the space rented to his partnership as the offices for the Works Agency, of which he was Director" (98 Ct. Cl. at 366).

Many of the cases cited in petitioner's brief are distinguishable in that they involved statutes which do not require any transaction of business or other activity by the public official in his official capacity in order to affect the validity of the contract. *Prosser* v. *Finn*, 208 U. S. 67, *Waskey* v. *Hammer*, 223 U. S. 85, *Ewert* v. *Bluejacket*, 259 U. S. 129. Typical of the statutes in these cases is that in the *Prosser* case, which was as follows:

> "The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office" (208 U. S. at 68).

Similarly, many of the State cases cited by petitioner involved similar statutes. *Nunemacher* v. *Louisville*, 98 Ky. 334, 32 S. W. 1091 (1895); *Hobbs, Wall & Co.* v. *Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); *Lesieur* v. *Rumford*, 113 Me. 317, 93 Atl. 838 (1915); *Bartley, Inc.* v. *Town of Westlake*, 237 L 413, 111 So. 2d 328 (1959); *City of Northport* v. *Northp Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902); *Edward E. Gillen Co.* v. *Milwaukee*, 174 Wisc. 362, 183 N. W. 679 (1921); *Stockton Plumbing & Supply Co.* v. *Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924); *Yonkers*

Bus, Inc. v. *Maltbie,* 23 N. Y. S. 2d 87 (Sup. Ct. Albany County 1940), aff'd, 260 App. Div. 893, 23 N. Y. S. 2d 91 (3d Dep't 1940).

Moreover, mere preliminary contact with a matter, which is terminated before definitive action is taken, cannot be considered to be the transaction of business. This is demonstrated by *Cobble Close Farm* v. *Board of Adjustment,* 10 N. J. 442, 92 A. 2d 4 (1952). In that case, an attack was made upon a quasi-judicial judgment of a local Board of Adjustment, which refused to grant a building permit and denied an application for zoning variance. The basis of the attack was that one Booker, who was a member of the local Board of Adjustment, had an adverse interest. Booker attended one hearing, sat through that hearing after having been challenged, and later viewed the premises with members of the board. The hearing was adjourned then for one week.

In sustaining the action of the board, the Supreme Court of New Jersey in an opinion by Mr. Justice Brennan, then a Justice of that court, stated:

> "Before the taking of testimony was resumed Mr. Booker voluntarily withdrew from further participation in the proceedings. He took no part whatever in the deliberations or vote upon the decision. The trial court found no evidence that the decision of the members of the board who did take part therein was in any manner influenced by Mr. Booker. Upon our independent review of the record we reach the same conclusion" (92 A. 2d at 10).

The only authority which petitioner cites as if it were to the contrary is *Edward E. Gillen Co.* v. *Milwaukee,* 174 Wisc. 362, 183 N. W. 679 (1921). However, this was a case in which the offending city commissioner was a salaried superintendent of the contractor but nevertheless participated in consideration of the plans on the basis of which advertisements for bids were published by the city, voted to approve such plans, and passed upon the competence

and reliability of bidders. Moreover, under the contract there were clear, direct and immediate conflicts between the commission and the contractor on such matters as increasing or diminishing the work to be performed (183 N. W. at 681).

If prior withdrawal by Wenzell from the matter was not effective in this case, then petitioner's statement that there was a simple remedy at hand which could readily be applied (Pet. Br., p. 76) is a hoax. At pages 42-63 of its brief, petitioner has so "infected" this contract with what it alleges were Wenzell's "decidedly significant" activities and "subconscious" motives before the sponsors even considered the possibility that First Boston might be hired as a financial agent, that at all times thereafter (*i.e.,* subsequent to February 25, 1954), it was already too late for what the sponsors actually did or what petitioner now recommends to do any good.

As the court below points out:

> "If, then, the Government intends to treat the possible indirect interest of a consultant's employer as injecting a taint of illegality into any contract which might eventuate, the whole transaction becomes futile nonsense, a nullity before the beginning of even preliminary discussion" (R. 18).

III.

Wenzell was not "directly or indirectly interested" in the contract during the time he was a Budget Bureau consultant.

Wenzell was not an officer, agent or stockholder of respondent or even of its sponsoring companies. He had no direct or indirect interest in their pecuniary profits. Therefore, he could satisfy the required "interest" relationship

under 18 U. S. C. 434 only by having an interest in the contract of respondent.

No finding was made that Wenzell had any interest in respondent's contract with the Government. Obviously there could have been no present pecuniary interest in that contract during Wenzell's Budget Bureau consultancy, since the contract was not in existence at that time. At most, an inference might have been drawn, which the court below did not draw, that Wenzell had a hope that, if subsequently negotiations were decided upon by the Government and such negotiations resulted in a contract, and if respondent decided to use the services of a financial agent in negotiating financing with institutional investors, First Boston might get the job (*supra*, p. 39). That hope was somewhat enhanced by First Boston's past history as financial agent for Ohio Valley Electric Corporation (F. 68, R. 84).

But the "ifs" involved were big "ifs" indeed. Dodge, Director of the Budget Bureau, was certainly in a position to know the situation. The finding is that, as late as March 9, "there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be obtained before the question of financing would arise" (F. 85, R. 95). Events proved that Dodge was right.

At no time during Wenzell's consultancy was there any assurance whatever that negotiations for a power contract would even start. That decision was not made by the President until June 14, 1954 (F. 130, R. 119), almost three months after Wenzell "had turned everything over to Adams" of the FPC, who had been called in by the Bureau to advise it on costs of the project (Fs. 92, 94, R. 99) and

over two months after the last contact of any kind between Wenzell and the Bureau.

There was no certainty that a financial agent would be utilized to negotiate the financing if a contract should eventuate. Many companies negotiate their own financing, and the employment of a financial agent depends upon such factors as the time of executives available for negotiations with institutional investors.

Even if it were subsequently determined that a financial agent should be utilized, it was by no means a foregone conclusion that First Boston would be the banking house selected. Other banking houses had been consulted on several occasions by a representative of respondent (Fs. 62, 101, R. 79, 103). As Judge Madden stated in the majority opinion below:

> "That the sponsors did not feel that they were, somehow, under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came, in May, to make arrangements for the financing of the hoped for project, Dixon, as we have seen, insisted over the objection of First Boston that Lehman Brothers should have a 40 percent interest in the financing, because that firm had some special talents that might be of use". (R. 16).

The majority opinion also stated:

> "There is not a shadow of evidence that it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation

> which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding" (R. 20).

The courts hold that a public official has no direct or indirect interest in the government contractor's pecuniary profits or contracts unless there is some relationship or understanding between the public official (or the public official's private employer) and the government contractor during his governmental activities relating to the government contract. In the absence of such relationship or understanding, any subsequent dealings between the public official and the government contractor are held to be immaterial in so far as the validity of the contract is concerned. Thus, in *Fredericks* v. *Borough of Wanaque*, 97 N. J. L. 165, 112 Atl. 309 (1920), a city councilman who was a member of a committee which let a contract to erect signs and build snowplows for the city, subsequently sold lumber to the contractor, which was needed by him in connection with the performance of the contract. Holding that these subsequent dealings did not invalidate the contract, the court stated:

> "But we are referred to no case which intimates that, in the absence of a corrupt understanding or agreement of the contractor with the member of council voting for the contract, or the purpose of evading the provisions of the Crimes Act, a resolution of the municipality, otherwise legal, is rendered illegal by the subsequent action of the contractor in purchasing his material from a recognized source of supply, the proprietor of which happens to be a member of the governing body which awarded the contract, and that the contract itself thereby becomes nugatory. The contention of the defendant quite obviously is resolvable upon the fallacious argument of conduct *post hoc* and not *propter hoc*;

> for manifestly the test of the legality of the contract must be determined as of the time when the resolution was passed, and not by the free act of the plaintiff in purchasing materials. If it was free of criminal taint at its inception, the subsequent action of the contractor in executing the contract cannot relate back, so as to invalidate it, unless such *ex post facto* action can be connected with a prior corrupt agreement or understanding with a member of the governing body, in pursuance of which the resolution was passed" (112 Atl. at 309-310).

To the same effect are *People* v. *Southern Surety Co.*, 199 Mich. 30, 165 N. W. 769 (1917); *Panozzo* v. *City of Rockford*, 306 Ill. App. 443, 28 N. E. 2d 748 (1940); *Escondido Lumber Co.* v. *Baldwin*, 2 Cal. App. 606, 84 Pac. 284 (1906); cf. *Wayman* v. *City of Cherokee*, 204 Ia. 675, 215 N. W. 655 (1927); 6 Williston, *Contracts* § 1735, n. 5 (Rev. ed. 1938).

In all these cases, there was a possibility of future dealing, since the future dealing in fact occurred. And in all these cases the courts refused to find the validity of the contracts in any way affected.

Petitioner contends that:

> "State courts which have considered the question have held that the interest of a prospective subcontractor constitutes an 'indirect interest' sufficient to invalidate a prime contract under similarly worded conflict-of-interest statutes" (Pet. Br., p. 52).

But the case primarily relied upon by petitioner in support of this proposition in fact points up the necessity, as did the court below in this case, of some understanding between the prime contractor and the prospective subcontractor during the time the public official is participating in govern-

mental activities relating to the prime contract. *City of Northport* v. *Northport Townsite Co.,* 27 Wash. 543, 68 Pac. 204 (1902), as pointed out by petitioner, involved a situation where:

> "Prior to the formal execution of the contract, there had been an understanding between the prime contractor and the councilman that his firm would supply the necessary lumber if the prime contractor's bid was accepted" (Pet. Br., p. 53).

In the present case the Findings, as stated above, are to the contrary. Wenzell became inactive in his consultancy March 23 (F. 94, R. 99), and his consultancy terminated completely April 3 (F. 106; R. 106). The financing arrangements were not made until May 12; in fact, as late as that date respondent felt perfectly free to give 40% of the financing agency to Lehman Brothers, and did just that (F. 113, 116, R. 111, 113).

The other case cited by petitioner, *Bissell Lumber Co.* v. *Northwestern Casualty & Surety Co.,* 189 Wisc. 343, 207 N.W. 697 (1926), is not in point because the statute in that case not only prohibited public officers from having pecuniary interest in a public contract, but also prohibited officers from *acquiring* any such interest.

Petitioner discusses *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, in connection with two points: (1) the principles relating to the interpretation of criminal statutes, and (2) the thought that "absence of privity did not deprive the United States of the statute's protection" (Pet. Br., p. 54).

With respect to the second point, respondent is at a loss to understand the relevance of petitioner's argument that "Congress was not concerned with the niceties of privity" (Pet. Br., pp. 54-55). The question is whether

Wenzell was "directly or indirectly interested" in the contract of respondent with the Government. The issue is not one of privity, but simply the necessity of proving some connection between an alleged interest of Wenzell and respondent's contract. Wenzell's alleged "interest" cannot be drawn out of the air.

With respect to principles of interpreting criminal statutes, while the *Marcus* case does say, as stated by petitioner, that they should not be interpreted with "utmost strictness," the decision also holds that in construing a criminal statute the court "must give it careful scrutiny lest those be brought within its reach who are not clearly included" (317 U. S. at 542).

Marcus also stands for another principle, relevant to the comment of Chief Justice Jones in the instant case, that this is not "a criminal prosecution in which it is incumbent upon the defendant to establish criminal intent" (R. 42). That principle is that words used in criminal statutes should be interpreted in the same way no matter what type of case is involved. Thus, speaking for this Court, Mr. Justice Black said:

> "* * * we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer" (317 U. S. at 542).

To the same effect is the opinion of Mr. Chief Justice Warren, speaking for the Court in *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284, 296:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of

> Justice. If we should give §1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly."

The extremes to which petitioner is driven in attempting to make out a case in this indirect criminal prosecution of Wenzell are demonstrated by its request that this Court convict Wenzell, not for what he did, but for what he had "a clear opportunity" to do (Pet. Br. pp. 51-52), or what he had "a clear economic reason to do" (Pet. Br. p. 52), or what he "could well have [been] led" to do (Pet. Br. p. 56), or even what he "might" have done (Pet. Br. p. 60). The Findings, of course, show that there was nothing adverse to the Government which Wenzell could or might have done within the scope of his assigned duties. But even if there were, petitioner's argument that a citizen can be convicted, not for what he does, but for what he has an opportunity to do or might do, is indeed a strange doctrine. Such a doctrine was rejected by the court in an analogous case, *Escondido Lumber Co.* v. *Baldwin,* 2 Cal. App. 606, 84 Pac. 284 (1906). In that case the court condemned the defense set up by

> "a public corporation, which has received all to which it was entitled, and which seeks to avoid the payment of an honest obligation on account of a mere surmise that the possibility of profit from a subsequent independent contract had an influence upon the minds of the officials connected with the execution of the original contract" (84 Pac. at 285).

Petitioner fails to distinguish between "indirect" and "remote." Obviously an interest can be either direct or

indirect and still be so remote as to have no effect. "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Van Itallie* v. *Borough of Franklin Lakes,* 28 N. J. 258, 146 A. 2d 111, 116 (1958).

In the cases cited by petitioner the interest was immediate and not remote. For example, in *Yonkers Bus, Inc.* v. *Maltbie,* 23 N. Y. S. 2d 87 (Sup. Ct. Albany County 1940), aff'd, 260 App. Div. 893, 23 N. Y. S. 2d 91 (3d Dep't 1940), the court decided that there were triable issues of fact where the allegations were that one of the aldermen who voted for a bus franchise was president of the company awarded the franchise. A more immediate interest would be difficult to imagine.

Edward E. Gillen Co. v. *Milwaukee,* 174 Wisc. 362, 183 N. W. 679 (1921) is similarly distinguishable. See discussion *supra,* pp. 52-53.

IV.

In any event the issue in this case is not solely whether Wenzell is guilty of violation of 18 U. S. C. 434. The petitioner must also establish that, on all the facts as found by the court below, public policy requires that the Court declare this concededly fair and honest contract unenforceable by respondent.

While most of petitioner's brief reads as if this were a criminal proceeding against Wenzell for a violation of 18 U. S. C. 434, it is plain even from petitioner's own statement of the "Question Presented" that the real issue in the case is whether Wenzell's activities as disclosed by the Findings were such as to enable the Government to repudiate its obligations under a concededly fair and honest con-

tract. Moreover, it is apparent from a careful examination of petitioner's brief itself that such a result would follow only from the existence of many factors besides Wenzell's alleged violation of that statute.

For 18 U. S. C. 434 is a penal statute and contains no "sanction of contract unenforceability" at all. Moreover, the statutory history of the Act indicates that such a provision was deliberately omitted by Congress. Under these circumstances, such a sanction will not be added judicially unless public policy clearly so requires. Moreover, it is clear from an examination of the cases cited in petitioner's brief that public policy does not require—in fact, does not permit—the invocation of such a sanction unless the alleged illegality is so inherent in the contract that it cannot be enforced without making the court a party to the violation of law, enforcement would aid the wrongdoer in profiting by his own wrong, or a Government contracting officer purports to enter into a contract which he is forbidden by law to make, so that the Government cannot be bound by his illegal act.

It is clear from the Findings in this case that no such situation is present here: the AEC was expressly authorized by Congress to make this very contract; neither Wenzell nor his private employer, First Boston, the so-called "wrongdoers," can profit by one penny through the enforcement of the contract; and it is not contended that Wenzell either had the power to or purported to bind the Government in any way. On the contrary, his activities were remote from and collateral to the making of this contract between the AEC and respondent.

Finally, the Findings disclose beyond peradventure that respondent not only recommended but effectively brought about the very steps leading to the timely termination of Wenzell's consultancy which the Attorney General, the

Bureau of the Budget and the AEC, as well as many other Government agencies presently prescribe as the proper procedure in dealing with such a situation. (See *infra*, pp. 84-85).

Thus, there is no basis whatever for petitioner's contention that public policy requires that the contract be held unenforceable by respondent. On the contrary, public policy requires that this fair and honest obligation of the United States be honored and performed.

A. Courts will not add a sanction of contract unenforceability to those imposed by Congress in a penal statute such as 18 U. S. C. 434 unless the alleged illegality is so inherent in the contract or the cause of action that the contract cannot be enforced without giving judicial sanction to the unlawful act.

While §434 is merely a penal statute and contains no suggestion that the consequences of a violation will be the invalidation of contracts, petitioner argues that, nevertheless, "this result follows from the clear language and evident purpose of the statute" (Pet. Br., pp. 68-69). We submit that the statutory history of the Act and the very cases cited by petitioner establish exactly the opposite.

1. Congress deliberately refrained from including a blanket sanction of unenforceability in 18 U. S. C. 434.

As pointed out by petitioner at page 68, footnote 22, "18 U. S. C. 216 [the so-called anti-bribery statute] is the only conflict-of-interest statute expressly providing for disaffirmance of contracts made in violation of its terms." Yet 18 U. S. C. 434, which was adopted at approximately the same time as 18 U. S. C. 216, contains no such provision. This difference was not due to inadvertence. For the statutory history shows that at the time Congress was con-

sidering and adopting these conflict-of-interest statutes, it was actively debating the significance and desirability of that very provision.

As originally drafted, §216, after providing criminal sanctions for obtaining a government contract by bribery, contained a further provision that any contract obtained by such means "shall moreover be absolutely null and void." *Cong. Globe,* 37th Cong., 2d Sess. p. 2958 (June 27, 1862). During the summer of 1862, it was urged on the floor of the Senate that this provision was too drastic, since it might deprive the Government of a contract which, despite the bribery, was advantageous. *Ibid.* Although the author of the bill insisted that the more drastic sanction would more effectively carry out the purposes of the Act, this provision was abandoned in favor of the less stringent provision that a contract obtained by bribery "may, at the option of the President of the United States, be absolutely null and void." 12 Stat. 578 (July 16, 1862). The following winter §216 was amended so as to broaden its coverage (12 Stat. 696 [Feb. 25, 1863]), and a few days later, the predecessor of §434 was adopted (12 Stat. 698-99 [Mar. 2, 1863]). Thus it is plain that Congress considered that criminal sanctions directed against any individual who engaged in business on behalf of the Government with a business entity in which he had an interest would adequately protect the Government from representation by a potentially disloyal officer or employee. Yet petitioner now asks this Court to add the very sanction which Congress had refused to adopt in enacting the companion §216—a section directed to the far more serious offense of bribery.

2. This Court has repeatedly held that a sanction of unenforceability will not be added to a penal statute unless absolutely required by considerations of public policy which are manifest on the facts of a particular case.

In support of its contention that invalidation of contracts follows from any infringement of §434, no matter how remote and immaterial in the context of the facts of the case, petitioner cites *Frost & Co.* v. *Mines Corp.*, 312 U. S. 38. To be sure, that case squarely raises the issue on which petitioner now relies:

> "Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering [*i.e.*, a violation of Section 5 of the Securities Act of 1933]. The basis for this demand is a supposed federal public policy which requires such annulment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences" (312 U. S. at 42-43).

But after stating that such a sanction had often been added "where the circumstances fairly indicated this would further the essential purpose of the enactment" (312 U. S. at 43), the Court, despite the assumed violation of the Securities Act, refused to apply the requested sanction and upheld the contract.

Thus, that case is but one of a long line of cases* in which this Court has repeatedly refused to add judicially

* *National Bank* v. *Matthews*, 98 U. S. 621; *Fritts* v. *Palmer*, 132 U. S. 282; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248; *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743; *Kelly* v. *Kosuga*, 358 U. S. 516.

a sanction of contract unenforceability to a penal statute for a violation of which Congress had provided criminal sanctions, except where the alleged illegality was so inherent in the contract itself, or in the plaintiff's cause of action, that the contract could not be enforced without giving judicial sanction to the illegal act. As stated by this Court, in rejecting a defense of illegality based on a seller's violation of the Robinson-Patman Act (15 U. S. C. 13):

> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; * * * that not one word suggesting its consideration appears in the debates of Congress * * *." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S 743, 750-51.

Since 18 U. S. C. 434 does not by its terms forbid the bargain, the ultimate issue in this case is not whether Wenzell is guilty of a violation of §434 (in which case, he should be fined and sent to jail, as Congress prescribed) but whether this Court should, on the facts now before it, act judicially to add a sanction preventing third parties from enforcing the contract, even though Congress did not see fit to do so.

3. The cases cited by petitioner show that a sanction of unenforceability will be invoked only when the illegality is inherent in the contract itself or where enforcement would enable the wrongdoer to profit by his own wrong.

As appears both from an examination of the foregoing cases and those cited by petitioner, a situation requiring the addition of a sanction of unenforceability arises only when the subject matter of the contract itself is illegal (*i.e.*, the bargain is in terms forbidden by statute), or where the wrongdoer himself would profit by his own wrong if the contract were enforced. In most cases both these elements are present. Thus, petitioner seeks support from the "familiar law that contracts which in their formation or performance violate prohibitory statutes are unenforceable" (Pet. Br., p. 69). But it is clear from the very cases cited in support of this proposition that this is but another way of saying that the courts will neither enforce a contract when its subject matter is unlawful nor lend judicial aid to a wrongdoer.

Thus, in *Miller* v. *Ammon*, 145 U. S. 421, the plaintiff was suing to collect the price of liquor he had sold without a license in violation of a penal statute. In rejecting his claim, the Court said:

> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover" (145 U. S. at 426).

Similarly, in *Burck* v. *Taylor*, 152 U. S. 634, the plaintiff was seeking to enforce an assignment of a contract to build a new capitol building for the State of Texas. The contract in terms provided that it could not be assigned without the consent in writing of the State, which had not been obtained. Analogizing the contract provision to a

statute, this Court held that the plaintiff could gain no rights by the unlawful assignment. And in *Bank of the United States* v. *Owens*, 27 U. S. 338 (2 Pet. 527), this Court refused to permit the Bank of the United States to enforce a usurious note made in direct violation of the Bank's charter on the ground that the Court would not "become auxiliary to the consummation of violations of law" (27 U. S. at 346). The same general factual situation will be found upon an examination of other cases cited by petitioner in support of its contention that a contract made in violation of a statute is unenforceable.*

It is plain that all these cases are based on both of the above mentioned criteria on which the courts rely when they invalidate a contract because of the violation of a statute not containing a sanction of unenforceability: the illegality is so inherent in the plaintiff's cause of action that the contract could not be enforced without making the courts a party to the illegal act, and in each case the wrongdoer would profit from his own wrong if the contract were enforced. As Professor Williston states the latter principle:

> "It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate. * * * When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law." 5 Williston, *Contracts* §1630 (Rev. ed. 1937).

---

* *E.g.*, *Deitrick* v. *Greaney*, 309 U. S. 190 (Pet. Br., p. 69) and *Kimen* v. *Atlas Exchange National Bank*, 295 U. S. 215 (Pet. Br., p. 69) (contracts which violated express prohibitions contained in the National Bank Act); *Ewert* v. *Bluejacket*, 259 U. S. 129 (Pet. Br., p. 64), *Waskey* v. *Hammer*, 223 U. S. 85 (Pet. Br., p. 39) and *Prosser* v. *Finn*, 208 U. S. 67 (Pet. Br., p. 64) (purchases of land by Government agents which were in direct violation of statutes prohibiting such purchases).

4. So far as the municipal cases cited by petitioner are relevant at all, they merely add support to the foregoing principles.

Petitioner also cites numerous cases in the field of municipal law,* in which a city council or municipal commission authorized a contract in which one of its members had an interest, in violation of a statute prohibiting such interest. *City of London Electric Lighting Co.* v. *London Corp.* [1903] A. C. 434 (House of Lords); *Finch* v. *Riverside & A. Ry.*, 87 Cal. 597, 25 Pac. 765 (1891); *Miller* v. *City of Martinez,* 28 Cal. App. 2d 364, 82 P. 2d 519 (1938); *Watson* v. *City of New Smyrna Beach,* 85 So. 2d 548 (Fla. 1956); *City of Northport* v. *Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902). At the outset, it should be noted that in all but one of these cases (*Finch* v. *Riverside & A. Ry.*) the city charter or other local law expressly declared that any contract in which a city official had an interest should be absolutely void. Thus they are irrelevant to the problem before us.** Nevertheless, it is primarily on

* (Pet. Br., p. 69).

** It is interesting to note that the *Northport* case was severely limited by the same court seven years later in *Shaw & Hodgins* v. *Waldron,* 55 Wash. 271, 104 Pac. 272 (1909). In that case, *Northport* had been cited as authority for the proposition that a city contract was void because the mayor had become interested in the principal contract, as a subcontractor. In limiting this contention the court said:

> "Although the construction put upon the Northport Case by respondents may seem warranted, yet we cannot think that it was ever the intention of the court to hold that a dealing on the part of the contractor with a city officer would do more than avoid a contract pro tanto. * * * *The statute is aimed at the officer, and intended to prevent a recovery on his part or to the extent of his interest when the claim is asserted by another.* This object is attained when the amount of his interest is determined and rejected". (104 Pac. at 274).

Thus, under the *Northport* case, as so limited, respondent could recover under the contract at bar even if §434 contained a sanction

these and other similar cases that petitioner relies for the proposition that fairness, good faith, full disclosure, etc. are irrelevant. As applied to such a statute we have no quarrel with that proposition. No court can, on any ground whatever, validate a contract which is expressly declared invalid by statute.

In any event, in these cases (including *Finch* v. *Riverside & A. Ry., supra*), as well as the many other municipal cases cited elsewhere in petitioner's brief,* the wrongdoing city official would profit through his unlawful interest if the contract were enforced. It is hornbook law that a municipality cannot be bound by a contract made by an unauthorized officer or agent. Thus, if a member of the contracting body was forbidden by law to make the contract, it is unenforceable. And this is true even in the absence of statute, for it is well recognized at common law that it is unlawful for a public official, as a public trustee, to deal with himself. Thus these cases might be relevant if a member of the AEC had been an officer or stockholder of the plaintiff, but they are obviously irrelevant here: In the first place, Wenzell had no power to make, and did not purport even to negotiate the present contract. In the second place, neither he nor First Boston can gain one

of unenforceability. Only Wenzell himself, or possibly First Boston, would be barred from recovering a commission if it could be shown that Wenzell had violated the statute.

* *Schaefer* v. *Berinstein*, 140 Cal. App. 2d 278, 295 P. 2d 113 (1956); *Hobbs, Wall & Co.* v. *Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); *Stockton Plumbing & Supply Co.* v. *Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924); *Hardy* v. *Mayor, etc. of City of Gainesville*, 121 Ga. 327, 48 S. E. 921 (1904); *Nunemacher* v. *Louisville*, 98 Ky. 334, 32 S. W. 1091 (1895); *Bartley, Inc.* v. *Town of Westlake*, 237 La. 413, 111 So. 2d 328 (1959); *Lesieur* v. *Rumford*, 113 Me. 317, 93 Atl. 838 (1915); *Duncan* v. *City of Charleston*, 60 S. C. 532, 39 S. E. 265 (1901); *Edward E. Gillen Co.* v. *Milwaukee*, 174 Wisc. 362, 183 N. W. 679 (1921).

penny by the enforcement of this contract. Consequently, enforcement of the contract will not require the Court to sanction Wenzell's activities, and would not require such sanction even though, contrary to the Findings, they were legally questionable.

But in any event, these municipal cases shed little light on the question of how this Court should apply 18 U. S. C. 434. The cases most relevant to this lawsuit are those in which this Court and other federal courts have been confronted with a contention that a contract of the United States is void because of an alleged violation of that section.

5. The principles which would permit recovery by respondent here have been consistently applied whenever the United States has sought to avoid a contractual obligation on the ground of an alleged violation of 18 U. S. C. 434.

So far as we are aware, the Government has raised an alleged violation of 18 U. S. C. 434 as a defense to a contract in six cases: *Muschany* v. *United States*, 324 U. S. 49; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1; *Rankin* v. *United States*, 98 Ct. Cl. 357 (1943); *Architects Building Corp.* v. *United States*, 98 Ct. Cl. 368 (1943); *United States* v. *Grace Evangelical Church*, 132 F. 2d 460 (7th Cir. 1942); and *The Curved Electrotype Plate Co.* v. *United States*, 50 Ct. Cl. 258 (1915). But the defense was sustained only in *Rankin* and *Curved Electrotype*, and in each of these the elements requiring judicial invalidation of the contract were clearly present. Thus Rankin, sole surviving partner of the lessee of certain premises, occupied such premises as offices for himself and his staff in his capacity as Regional Director of the WPA. No formal sublease was ever executed with the Government. Later he brought suit against the Government for the fair rental value of the premises. In disposing of his claim, the Court of Claims said:

> "The rule * * * is that an act done in violation ~~of the~~ statutory prohibition is void *and confers no rights upon the wrongdoer.* It would be strange indeed to allow the plaintiff to recover a reasonable rental value for the space controlled by him when the statute makes it a crime punishable by fine and imprisonment for him to act for the Government and deal with himself" (98 Ct. Cl. at 367).

In *The Curved Electrotype Plate Co.* v. *United States*, 50 Ct. Cl. 258 (1915), the complaint alleged an express or implied contract with the Public Printer for the use of the plaintiff's patents and demanded a reasonable compensation for such use. The person who was the Public Printer was also an organizer and former stockholder of the plaintiff corporation and still claimed an equitable interest in its earnings. The Court of Claims denied recovery on the ground, *inter alia,* that there could not have been an implied contract because

> "The Public Printer could not act for the Government so as to bind it when he had an interest direct or remote in the subject matter of the contract" (50 Ct. Cl. at 272).

Thus in each of these cases the acts of the Government official which were alleged to have bound the Government were in direct violation of the Act; in each the wrongdoer would have profited by enforcement of the contract, and in each the court could not enforce the contract without giving judicial sanction to a statutory violation.

In the other four cases the defense of illegality was rejected as a matter of public policy even though in each the facts disclosed a literal violation of the Act.

Thus in *Architects Building Corp.* v. *United States*, 98 Ct. Cl. 368 (1943), decided by the Court of Claims

on the very day that it rejected Rankin's claim, *supra,* the building corporation which owned the building involved in both cases was permitted to recover the reasonable rental value of premises other than those in which Rankin himself had a personal interest, even though Rankin was simultaneously president and stockholder of the building corporation, and Regional Director of the WPA, the lessee. Recovery was permitted on the ground that Rankin himself would receive, no personal benefit from a judgment in the corporation's favor since he received no salary as president and the stock was virtually worthless, and on the further ground that he had taken no personal part in the negotiations between the WPA and the corporation.

In *United States v. Chemical Foundation, Inc.,* 272 U. S. 1, the Government sought to set aside a sale of patents made by a prior administration on the ground that the sale was void under 18 U. S. C. 434. Here the Alien Property Custodian, pursuant to Congressional authority, had set up a Chemical Foundation in which he and other officials of his department were directors and officers and had sold certain patents seized from enemy aliens during World War I to that Foundation. The Government contended that the sale was void under §434 because the officials who had sold the patents were officers of the corporation that had purchased them. The Supreme Court refused to invalidate the Government contract by which the patents were sold, concluding that the transactions complained of did not involve the evils at which the statute was aimed. With regard to §434 the Court stated:

> "It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose" (272 U. S. at 18).

It will be observed that in each of the foregoing cases there was clearly a literal violation of §434:

> "* * * an officer * * * of [a] corporation * * * [was] employed * * * as an officer or agent of the United States for the transaction of business with such business entity * * *."

The most compelling authority in support of respondent's position here is presented by the cases of *Muschany* v. *United States*, 324 U. S. 49, and *United States* v. *Grace Evangelical Church*, 132 F. 2d 460 (7th Cir. 1942). Those cases dealt with a practice whereby the War Department had retained agents to negotiate options for the sale of land needed by the Department. The agent's commission was to be 5% of the purchase price and was to be paid by the seller. Upon acceptance by the War Department, the options became contracts. Thus the Government agent had a pecuniary interest in the contract he was negotiating with the landowners, a pecuniary interest which was in direct conflict with that of the Government. As was brought out by Justice Black in his dissenting opinion in *Muschany*:

> "For the terms of McDowell's [the Government's purchasing agent] contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself". (324 U. S. at 72).

When it began to appear that the agents were recommending acceptance of options at exorbitant prices, the War Department stepped in and attacked the contracts on two grounds: (1) that they were void under the express statutory prohibition against the use of the "cost-plus-a-percentage-of-cost" form of contract contained in the

National Defense Act of 1940,* and (2) that in any event the Government agent's obvious conflict of interest rendered the contracts void as a matter of public policy, as established by §434 as well as the bribery statute and the statute prohibiting Government agents from accepting or receiving money from third parties (18 U. S. C. 216, 281). *Muschany* v. *United States*, 324 U. S. at 54, 67.

Thus, in these cases the courts had both types of conflict-of-interest statutes before them: (1) a statute specifically prohibiting cost-plus-a-percentage-of-cost contracts, and (2) statutes making it a crime for Government representatives to engage in transactions involving a conflict of interest.

Throughout the litigation all parties and all judges assumed that if the contracts were cost-plus-a-percentage-of-cost contracts, they were in violation of the statute and void. The only difference of opinion was whether they were contracts of the prohibited type.

On the public policy issue, the Government counsel and the dissenting opinions emphasized that the contracts had been negotiated by a Government agent who had an interest in direct conflict with that of the Government. However, neither of the dissenting opinions suggested that the contracts were void or unenforceable because of violation of §434. They contended that the contracts were void because of considerations of public policy which would exist if §434 had never been enacted.

Thus the *Muschany* and *Grace Church* cases illustrate the principle that "except where bargains are in terms forbidden by statute, the common law, whenever it refuses to enforce them, though they comply with the ordinary require-

---

* "*Provided further*, that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War" (54 Stat. 713, July 2, 1940).

ments for the formation of contracts, so decides on the basis of public policy." 5 Williston, *Contracts* §1628 (Rev. ed. 1937). Clearly, if §434 operated to outlaw contracts involving a violation of that section, these contracts would of necessity have been held invalid simply on the proof of the Government agent's conflict of interest. But instead the courts, despite the apparent violations, directed their attention solely to the question whether public policy required the contracts to be held unenforceable.

Thus, in *Grace Church* no mention of §434 was made at all. The majority simply rejected the public policy argument on the ground that:

> "Illegality arises from secret commissions, not from those known to both parties. Freedom of contract is to be preserved and where, as here, the procedure, if not instituted or suggested by the Government, was at least carried to a conclusion with its knowledge and acquiescence, it may not complain" (132 F. 2d at 462).

In *Muschany,* the majority of this Court concluded at the outset that, because the Circuit Court of Appeals had affirmed the District Court, which had found that the contracts were made in good faith, evidence of fraud, bad faith and misrepresentations contained in the record could not be considered. "Therefore this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid" (324 U. S. at 58).

The Court then turned to the contention that the contracts violated the prohibition against cost-plus-a-percentage-of-cost contracts and concluded that in fact they were "cost-plus-a-fixed-fee contracts," which were expressly authorized by the National Defense Act* (324 U. S. at 63).

---

* It is respectfully suggested that in commenting on *Muschany* in his dissent below in the instant case (R. 31-32), Mr. Justice Reed was referring to this part of the Court's opinion, rather than to the majority's decision on the public policy issue raised by the agent's conflict of interest.

The Court then dealt with Government counsel's contention that the contracts must be held unenforceable as a matter of public policy because of the Government agent's conflict of interest (324 U. S. at 64). The Court stated the issue as follows:

> "In the absence of a plain indication of [a contrary public] policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy" (324 U. S. at 66-67).

The Court considered 18 U. S. C. 434 and the other sections cited by the Government, and rejected the contention that they established a public policy requiring the invalidation of a contract negotiated by an agent with a conflict of interest. After noting that "certainly the [Government] officers realized the possibility of and temptation to price inflation" but may have thought they could control this problem (324 U. S. at 65), the Court refused to invalidate the contracts, saying:

> "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated" (324 U. S. at 66).

Nor did Mr. Justice Black in his powerful and persuasive dissent say that the contracts were *ipso facto* void as against public policy because of the agent's conflict of interest. Instead he pointed out that the case might, upon remand, be found to involve fraud, unconscionability and unjust enrichment, and cited cases dealing with these factors. (See 324 U. S. at 82).

Here, as petitioner concedes, "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59).

We submit that the *Muschany* and *Grace Church* cases are indistinguishable from the case at bar and conclusively support respondent's position. Indeed, the Government's position in those cases was far stronger than it is here. McDowell, the Government's agent in *Muschany*, who alone negotiated and recommended acceptance of the contracts, had a clear and obvious interest in those contracts adverse to that of the United States; there can be no doubt that his acting as "an agent of the United States for the transaction of business" with business entities (the landowners) in whose "contracts" he had an interest was prohibited by 18 U. S. C. 434. Moreover, as Mr. Justice Black pointed out in his opinion, "The landowners' rights are indissolubly intertwined with McDowell's" (324 U. S. at 77). In other words, in that case the "wrongdoing" agent himself profited through his 5% commission from the enforcement of the contracts.

On the other hand, the plaintiffs in those cases had no choice but to deal with the Government's agent on the terms prescribed by the Government. Moreover, the agent's superiors were fully aware of his conflict of interest and at least in the majority's view in *Muschany*, the contracts came before the Court "without any suggestion of fraud or unfairness such as would justify holding the contracts invalid" (324 U. S. at 58).

Since public policy required that those contracts be enforced, despite some aroma of actual fraud disclosed by the evidence presented in the District Court, we submit that *a fortiori* the Government must not be permitted to repudiate its obligations under the contract at bar where fraud and corruption are admittedly absent (R. 17), respondent's sponsors actually brought about the removal of Wenzell long before contract negotiations were even decided on by the Government, and neither Wenzell nor his

private employer, First Boston, will in any way benefit from enforcement of this contract.

B. On the facts in this case, when considered in the light of the foregoing principles of law, it is plain that public policy requires that the contract in suit be enforced.

When the principles of law discussed in the prior point are borne in mind, it is quite apparent that there is no basis whatever for the proposition that this is a case in which public policy requires that the Court add a sanction of contract unenforceability to the criminal sanctions provided by Congress in 18 U. S. C. 434. On the contrary, public policy requires that a fair and honest contract of the Government such as that at bar be enforced. Clearly no action of Wenzell's disclosed by the record is so inherent in either this contract or this plaintiff's cause of action, that enforcement of the contract would require this Court to give judicial sanction to those activities. He was not a government contracting officer and he did not take any part in the negotiation of this contract. Indeed, the Budget Bureau itself, for which he acted as a consultant, held no more than a "watching brief" to see whether, from the standpoint of costs, it was feasible even to open negotiations for such a contract. The contract was made by the AEC, which was expressly authorized to do so by Act of Congress (Fs. 148, 152, R. 137, 140-43).

Thus no violation of any statute or other illegality can possibly be involved either in the formation or performance of this contract. Even if petitioner's characterization of Wenzell's activities could be accepted, those activities were too remote and collateral to affect the validity of this contract. As Professor Corbin puts it in terms directly applicable to petitioner's most extreme contentions:

> "There are many bargains, wholly lawful in themselves, that the parties would not have made except for the fact that an antecedent illegal transaction had taken place. A mere causal relation such as this, the bargain not being substantially identical with the illegal transaction and its enforcement not being the consummation of an illegal purpose, is not ground for refusal of enforcement. The illegal transaction is in such cases described as 'collateral' or 'remote'." 6 Corbin, *Contracts* §1529 (1951).

Mr. Justice Brandeis, writing for a unanimous Court, expressed the same principle as follows:

> "The bar applied is not the plea of illegality commonly interposed in suits brought to enforce contracts tainted by illegality. In those suits the illegality relied on is inherent in the cause of action; is directly connected with the relief sought; and constitutes a substantive defense. Here, the relation of the illegality to the relief sought is indirect and remote. The wrong done is a thing of the past and is collateral. By the long line of cases following *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on." *Loughran* v. *Loughran*, 292 U. S. 216, 228.

It is difficult to conceive of a case in which the allegedly illegal "transaction of business" was more remote from the contract upon which suit was brought than it was here. As we have shown (*supra*, pp. 12-21), any "transaction of business" by Wenzell was first and foremost in connection with the February 25 proposal by the sponsors, a proposal which was withdrawn after March 24, 1954 (Fs. 93, 95, R. 99-100), and which never again was of any moment. Wenzell's consultancy terminated on April 3, 1954, and the proposal of April 10 was not even drafted until after that time (Fs. 100, 106, R. 102-03, 106).

But even on the assumption that Wenzell's "transaction of business" could somehow be said to be applicable to the April 10 proposal, it would make no difference. His activities would still be too remote to affect the enforceability of the contract.

They were too remote in time, since this is not a case where the contract sued upon resulted from the acceptance of an offer, an acceptance following as a foregone conclusion immediately after the submission of the proposal and the resignation of the alleged dual agent. On the contrary, as we have shown, it was not until after Wenzell terminated his Government consultancy that the April 10 proposal was scrutinized and analyzed by the Government along with the competing Von Tresckow proposal; it was not until two and one-half months after Wenzell left that the President of the United States decided that negotiations should be opened with the petitioner; and as late as November 10, 1954, over seven months after Wenzell had left, it was still uncertain whether there would be any contract.

Wenzell's activities were too remote in causation, for the contract which was eventually worked out was negotiated for the Government by independent, single-minded representatives, was reviewed by every agency of the Government which could conceivably have any interest in the matter or expertise to contribute, and was subjected to searching scrutiny and analysis by Congress itself before the contract became a certainty and was signed. Even if, contrary to the fact, Wenzell had had the most obvious adverse interest, the contract in this case would have to be found to be the result of the admittedly independent activities of all these high officials and agencies of the Government, and not the result of anything Wenzell did.

Finally, as will be shown more fully, there can be no question on these facts that the sponsors were blameless

in relation to Wenzell's activities. For although they had no control over Wenzell himself, they initiated the very steps to bring about the timely termination of his consultancy with the Bureau which are presently prescribed by the highest legal authority in our Government (*infra*, pp. 84-85).

C. Refusal of enforcement of a fair and honest Government contract such as that at bar would be neither as effective nor as reasonable a remedy for the protection of the United States as that prescribed by Congress in 18 U. S. C. 434.

Evidently recognizing that none of the normal criteria hitherto established by the courts as a ground for invalidating contracts because of the alleged violation of a penal statute were applicable to this case, petitioner advances an additional criterion: that "non-enforcement is an effective and appropriate protection for the United States against contravention of the Congressional mandate in 18 U. S. C. 434" (Pet. Br., p. 80). But petitioner cites no cases, and we know of none, in which such a sanction has been added to penal sanctions already prescribed by Congress in the absence of the circumstances heretofore discussed.

If petitioner were truly concerned over the proper implementation of the Congressional purpose in 18 U. S. C. 434, an obviously more effective method of accomplishing that purpose would be to pursue the course prescribed by Congress itself: bring a criminal prosecution against the alleged wrongdoer, Wenzell. "It goes without saying that in all dealings with the government, contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty. *Criminal sanctions enforce this rule.*" *Muschany* v. *United States*, 324 U. S. at 59.

Surely Wenzell's conviction and punishment would be a far more effective deterrent to potential future violators of

the Act than the punishment of blameless third parties, as now proposed by petitioner. But of course petitioner did not and will not pursue that remedy since it is perfectly obvious from the Findings in this record that no such conviction could possibly be obtained. In fact, petitioner is flying directly in the face of decisions of this Court (*supra*, pp. 59-60) which have pointed out that criminal statutes are construed in the same way regardless of the type of case involved. Obviously petitioner is seeking an interpretation more favorable to it in the present case than it could possibly expect were it following the procedure prescribed by §434 and prosecuting Wenzell.

D. The steps taken by the sponsors, Wenzell and his Government superiors to bring about the timely termination of his consultancy followed the procedures prescribed by the current regulations of the Department of Justice, as well as the AEC and the Bureau of the Budget.

Petitioner argues at some length that the imposition of a sanction of non-enforcement against respondent would have "the important supplementary effect of inducing contractors to do more than give lip service to the public policy against conflicts-of-interests" (Pet. Br., pp. 80-81). According to petitioner, while respondent knew of Wenzell's allegedly "infecting interest, yet [it] did not take the simple steps necessary to remove that infection" (Pet. Br., p. 81). And again, "Contractors who wink should not be encouraged to expect the courts to enforce infected contracts * * *" (Pet. Br., p. 83).

This is a surprising line of argument to be advanced by the Solicitor General in the light of the steps actually taken by respondent's sponsors, as unanimously found. The conduct of respondent's sponsors, of Wenzell himself, and of his immediate Government superiors was in accord

with the procedures prescribed for such a situation by the current regulations of the Solicitor General's own department, as well as by those of the AEC, the Bureau of the Budget, and a number of other federal departments. Thus Department of Justice Order No. 145-57 entitled "Standards of Conduct Relating to Personal Business Interests, Transactions and Other Dealings of Employees" (Mar. 27, 1957), provides as follows:

> "No officer or employee of the Department who owns any stocks, bonds or other financial interest in any enterprise shall participate in or make a decision on behalf of the Department concerning that enterprise. In any case in which an officer has such an interest he shall immediately disqualify himself from acting, in writing, *and inform his superior of the reasons for his disqualification. He shall take no action in any such matter unless authorized to do so under the conditions prescribed by the Deputy Attorney General.*"

Similarly, the current regulations of the AEC (AEC Manual Chap. 4124, "Conduct of Employees" (Sept. 22, 1954)) provide as follows:

> "032 b. *An employee shall notify his supervisor* whenever, because of personal, family, financial or other considerations, *there is a possibility* that he should be disqualified from taking action on any matter with respect to which he is called upon to exercise authority or discretion, to give advice, or to make recommendations. If the supervisor concludes that the employee should be disqualified, he will relieve the employee from any duty or responsibility for the matter in question."

The Manual of the Bureau of the Budget itself, in Section 810, "Establishment and Observance of Standards of Conduct" (Oct. 28, 1954), provides as follows:

"810.3 b. *Outside interests and activities.*

* * * * * * *

> "An employee who intends to engage in any outside employment should inform his immediate supervisor. Any employee or supervisor who is uncertain as to the propriety of proposed outside employment should request guidance from the Personnel Officer."

Similar provisions are found in the regulations of a number of other federal departments.*

With these guides as to what the highest legal officer of the Government as well as the very departments concerned in this litigation consider to be the appropriate procedures to be taken when any question involving a potential conflict of interest arises, let us look at the record and see to what extent respondent's sponsors, Wenzell himself, or his immediate Government superiors, Dodge and Hughes, merely gave "lip service" to or "winked" at alleged violations of the law.

The Findings disclose that some time in February of 1954, Daniel James, Dixon's counsel, became concerned lest embarrassment might result from Wenzell's position with

---

* Department of Commerce, Order No. 77, "Conflicts of Interest and Private Business Activities of Officers and Employees," §§4, 6 (Aug. 5, 1955); Department of Defense, Memorandum entitled "Conduct of Personnel Assigned to Procurement and Related Agencies" (Jan. 28, 1957), reprinted in *Exemptions from Conflict-of-Interest Statutes in Defense Employment*, Hearings before the Military Operations Subcommittee of the House Committee on Government Operations, 86th Cong., 2d Sess., p. 65 (1960); Federal Communications Commission, FCC 54-1176, "Policy Statement Relating to the Review and Inspection Program for Detection and Prevention of Improper Conduct of Employees of the Federal Communications Commission" (Sept. 17, 1954); Federal Trade Commission, Personnel Bulletin No. 12, "Conflict of Interest", §§ V, IX (Sept. 25, 1957); Securities and Exchange Commission Manual of Administrative Regulations, Section 701, "Conduct Regulation," Rule 4 (Nov. 2, 1956).

the Government in the event that a contract should ultimately be agreed upon and First Boston should be selected to assist in obtaining the necessary financing. He discussed the problem with Dixon, and on February 23 Dixon took the matter up with Wenzell, suggesting that "Wenzell discuss the situation with the Bureau of the Budget and with his counsel" (F. 68, R. 84-85), both of whom would know or have access to all the facts regarding Wenzell's consultancy. On the same day, Wenzell discussed the matter in some detail with Hughes, who "replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore the question with counsel, and then to talk with Dodge about the matter" (F. 69, R. 85).

Thereafter, Wenzell discussed his situation with First Boston and its counsel, Sullivan & Cromwell, and was advised by the latter to resign at once and in writing. Petitioner attempts to use the fact that Wenzell did not follow this advice to the letter. The validity of this attempt is, to say the least, highly questionable in view of the wholly inchoate state at that time of the possibility of there ever being a contract to be negotiated with respondent and the fact that Hughes had told Wenzell the matter was being exaggerated, instructed him to discuss it with Dodge, and continued to give him assignments.

In any event, even if Wenzell were at fault in following the advice of Hughes, his immediate Government superior, rather than that of First Boston's counsel, it is difficult to see what bearing that fact would have on the present claim of respondent. For the record shows that after the initial conversation with Wenzell, James followed up with Dean, First Boston's lawyer, and Dixon followed up with an official of First Boston, from whom they learned "that First Boston's counsel had advised Wenzell to resign his position

the Budget Bureau at once" (F. 78, R. 91-92). That
van & Cromwell's advice was actually somewhat more
led and broader (F. 72, R. 87-88) is not shown ever to
been told to any representative of respondent. In other
s, so far as respondent was concerned, the matter had
referred to and acted upon by eminent counsel, who had
e facts.

eanwhile, when Dixon and James found that Wenzell
ontinuing to attend meetings at the Bureau, they took
natter up with Hughes later in March: "Although
s had understood that Wenzell was going to resign,
d learned that Wenzell was occasionally taking part
etings of the Budget Bureau and James wanted to
why Wenzell was continuing to act as a consultant
e Bureau. * * * Hughes made no comment on the
r" (F. 78, R. 92).

eanwhile, on March 9 Wenzell had called on Dodge
aised with him the problem of Wenzell's continued
ltancy to the Bureau, as he had been instructed to do
ughes. Dodge had pointed out to Wenzell that "at
ime, there was no proposal that could be used for a
of negotiation, and Dodge felt that there would be
; period of negotiations and that many preliminary
vals would have to be obtained before the question
ancing would arise. However, Dodge told Wenzell
f there was any likelihood that First Boston might
ipate in any financing which developed in the future,
ll should finish his work with the Bureau as quickly
sible. Wenzell replied that he would terminate his
n the Bureau soon" (F. 85, R. 94-95).

the same conference with Dodge "Wenzell stated
was not qualified to advise the Bureau on the matter
rall costs and suggested that Dodge make arrange-
to obtain the services of Francis L. Adams, Chief of

the Bureau of Power, Federal Power Commission" (F. 85, R. 95).

That Wenzell did what Dodge told him to do—finish his work with the Bureau as quickly as possible—is established. On that same day, March 9, Wenzell attended a meeting at the Bureau at which an analysis of the sponsors' proposal of February 25, prepared jointly by the AEC and TVA, was discussed. Wenzell joined in the general opinion that the estimates of cost were too high and was asked to speak to the sponsors in order to "determine whether the sponsors would submit a better proposal" (F. 84, R. 94). Thereafter, Wenzell attended two more meetings at the Bureau, on March 11 and 16, at which the joint AEC-TVA analysis was further discussed. On the latter date, Wenzell again suggested that Adams be brought in (Fs. 87, 89, R. 96-97).

The meeting of March 16, held one week after Wenzell's conversation with Dodge, really marked the end of Wenzell's active participation as a Budget Bureau consultant. On March 19, 1954, Adams took over from Wenzell (F. 91, R. 98-99). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell " 'to make sure that he (Wenzell) had turned everything over to Adams' " (F. 92, R. 99). The next day, "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (F. 92, R. 94-95).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Fs. 94, 97, 98, R. 99-101).

Thus, it is evident that as a direct result of the "expressions of concern" by the sponsors to Wenzell's Government superiors, both Wenzell and his Government supe-

riors took steps to terminate his consultancy as soon as possible without interfering with turning over of his duties to Adams. And this was accomplished three months before the President decided to have negotiations commence, and over seven months before the contract was agreed upon and executed.

In view of these undisputed facts, it comes as a distinct shock to read the Solicitor General's statement, at page 76 of petitioner's brief, that "Respondent has little ground upon which to claim credit for Wenzell's withdrawal from the transaction *after* [*sic*] the acceptability of their proposal was established" (Emphasis in original). The Findings show that the sponsors brought about Wenzell's withdrawal before the sponsors' proposal that furnished the starting point for negotiations had even been drafted.

As we read petitioner's brief, its contention is that when private citizens are requested to assist the Government in carrying out its policies, it is not enough that they do so in a fair and honorable manner. They must assume the burden of acting as wet-nurse to the Government officials with whom they are dealing, and see to it, *at their peril,* that those officials make no mistakes, even though they may be among the highest ranking officials in our Government, responsible directly to the President. We find it difficult to believe that the Solicitor General seriously contends that this is the policy of our Government, or that it would be in the public interest if it were, particularly in view of his own departmental regulations.

But in any event, the Government officials involved in this case performed their duties effectively and successfully. It appears to be an important part of the Government's contention that the "conflict" was not successfully "removed." It suggests that the failure of Hughes and

Dodge to fire Wenzell forthwith when the matter was first brought to Hughes' attention on February 23 constituted an attempt by them to "waive" §434. This is manifestly absurd. It was true at that time, as both Hughes and Dodge pointed out, that the problem was being exaggerated. For there was in fact "no proposal that could be used for a basis of negotiation" before the Government at that time, and there would not be one for some time to come. Dodge and Hughes were perfectly familiar with what Wenzell was doing, and were undoubtedly aware that Wenzell's participation as a consultant to the Bureau during the exploratory discussions as to the feasibility of the project did not constitute any violation of law or any improper activity on his part. What they did was not an attempt to "waive" §434. They took appropriate and successful administrative steps to prevent any possibility of its violation without interfering with the progress of the exploratory discussions. That is just what the departmental regulations now prescribe.

Petitioner also complains that "despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell; they dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract" (Pet. Br., p. 76). We would point out that during the period of Wenzell's Government consultancy, the only service of First Boston, made available through Wenzell or otherwise, that the sponsors are found to have "utilized," was the securing of First Boston's predictions as to probable interest rates, and that in getting these predictions for both the sponsors and the Bureau Wenzell was complying with instructions of Hughes, his Government superior (F. 55, R. 76).

Finally, petitioner intimates that Hughes and Dodge were negligent in not consulting the Attorney General (Pet. Br., p. 66). If all the facts, including the true nature of Wenzell's employment by the Bureau, had been submitted to the Attorney General by Hughes and Dodge on February 23, we submit that he would have advised that they take precisely the course they did take: tell Wenzell to wind up his activities and withdraw before any problem of conflict could arise. For that would have been in accordance with what his Department, as well as the AEC and the Bureau of the Budget, now prescribe as the proper course to pursue in such a situation, and the unanimous Findings show this is precisely what happened.

In the case at bar, petitioner's position is, as stated by the court below, "essentially cynical" (R. 17). For, in the last analysis, its entire case rests on the proposition that it is against public policy to carry out the procedures prescribed by the highest legal officer in the Government.

V.

In any event, respondent is entitled to recover the reasonable cost of its services as found by the court below, since the direct result of those services was to save petitioner a capital expenditure of over $100,000,000.

Petitioner concedes that "a recovery *quantum valebat*, as on an implied contract, may be available to a plaintiff whose express contract is unenforceable because infected by a conflict-of-interest" (Pet. Br., p. 79). But petitioner argues that this remedy is not available to respondent because "in this case, the United States received nothing and retains nothing under the arrangement with respondent" (Pet. Br., p. 80).

This is simply not true unless the policy decision by the President of the United States of what the United States wanted to receive is to be disregarded. As the court below found, it was basic Administration power policy that the expenditure of over $100,000,000 of federal funds on the construction by TVA of a plant at Fulton, Missouri was to be avoided if possible (Fs. 22, 23, 36, R. 56-57, 63).* It is plain from the Findings in this case that as a direct result of what respondent did, the Administration policy was accomplished and the taxpayers of the United States were saved this expenditure.

We are not arguing the wisdom or unwisdom of the Administration's policy. We say only that the policy was established, and it was the efforts of respondent which permitted the Administration to realize its policy objectives.

It is irrelevant in this respect that a third party, the City of Memphis, later made unnecessary the supply of power under this contract; the contract had already accomplished its intended result. The Government got what it wanted, and it should not now be permitted to welsh on its obligation to pay the cost of achieving its object.

As the unanimous Findings show:

> "The defendant offered no evidence that plaintiff had failed to perform any of the obligations set forth in these provisions [of the contract]. The undisputed evidence establishes that at the time the defendant terminated the contract, plaintiff had performed such obligations imposed upon it by the contract in all

---

* Not even petitioner's brief suggests that Wenzell had anything to do with this policy. On the contrary, it is expressly conceded that he did not (Pet. Br., p. 10). In fact, as is shown by petitioner's brief (Pet. Br., p. 10), Wenzell was not recalled until the Government had determined to seek power from private companies, including Middle South Utilities, Inc., one of the sponsors.

instances where performance was timely, or that it was proceeding diligently toward performance" (F. 17, R. 55).

The judgment below was that respondent should recover the costs involved in such performance, and judgment was entered for the amount of those costs as determined by the court. That judgment was sound and serves the public interest by upholding the enforceability of good faith contracts with the United States.

Conclusion.

The judgment of the Court of Claims herein should be affirmed.

Respectfully submitted,

John T. Cahill,
Attorney for Respondent.

William C. Chanler,
Robert G. Zeller,
Margaret Taylor,
Of Counsel.

Dated: September 26, 1960.

No. 26

In the Supreme Court of the United States

October Term, 1960

The United States, petitioner

v.

Mississippi Valley Generating Co., on Its Own Behalf and to the Use of Others

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
RICHARD J. MEDALIE,
HOWARD E. SHAPIRO,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 26

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

In this reply brief, we correct the many factual errors in respondent's brief by pointing out the relevant findings of the Court of Claims which contradict respondent's version of the facts and support the factual structure on which we rest our legal argument. We shall also discuss certain of the legal contentions made in respondent's brief which we did not sufficiently answer in our main brief.

I

WENZELL PLAYED A SIGNIFICANT ROLE WITH RESPECT TO THE TRANSACTIONS BETWEEN THE GOVERNMENT AND THE RESPONDENT

The basic theme running through all the events leading up to the negotiation of the actual contract in the present case is, in the words of the majority of the court below, that "[w]hile the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work" (R. 13).

Despite this clear finding by the Court of Claims, the major portion of respondent's brief is devoted to an attempt to demonstrate that "Wenzell was not a significant person in this transaction; he did not play a significant role * * * (Resp. Br., p. 9). Specifically, respondent's argument may be summarized in the following propositions: (1) "Whatever influence Wenzell had as a Budget Bureau consultant * * * related only to the February 25 proposal * * *," and his "activities in connection with the February 25 proposal are in their proper perspective when their unimportance initially is realized * * *." (2) Wenzell "had nothing to do with the reviews and analyses of the April 10 proposal * * *." (3) Nor did he have anything to do with "the decision to begin the negotiation of the contract, the negotiation of the contract, or the extensive reviews and analyses of the contract before it was finally executed * * *." In sum then, respondent maintains that "Wenzell * * * did not assert *any* influence, let alone any *significant influence*, over the transaction in suit here, *i.e.*, the contract" (Resp. Br., p. 26). The court's findings of fact, however, show

Wenzell in quite a different role. In discussing his participation, we shall rely on the court's findings—which run counter to respondent's factual argument at almost every point.[1]

1. *Wenzell's continuing role as to the cost of money, and the importance of that factor.*—There can be no dispute that Wenzell's primary function "was to assist the Bureau * * * with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs" (F. 45, R. 70). Respondent does not dispute this fact (see Resp. Br., pp. 9, 14–15), but rather attempts to minimize the importance of it.

In contrast, the court below had no trouble in emphasizing the importance of Wenzell's function in ascertaining the cost of money. As it pointed out: "It was well known that the cost of money played an *important part* in the cost of the entire project and in the price at which the energy could be produced and sold" (F. 55, R. 76, emphasis added; see also Fs. 47, 67, R. 72, 84). Moreover, "[i]t was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and * * * the cost of money is the *largest component* of cost included in the capacity charge" (F. 104, R. 105, emphasis added). Finally, inasmuch as the Administration wanted "to make a fair and prudent bargain with" private enterprisers, the Bureau of the Budget, in order "to know what would be a fair bargain * * * had to know what interest rate the enterprisers would

---

[1] In the Appendix, *infra*, pp. 40–41, we give an index and short identification of various individuals mentioned in the findings.

have to pay on the bonds which they would have to sell to finance the project. * * * Since Hughes knew * * * [Wenzell] and trusted him, it was natural that he should look to him for advice on the cost of money" (R. 5). The ultimate object of the Budget Bureau of course was "to obtain the best [interest] rate possible * * *" (F. 55, R. 76).

Wenzell really worked at his task of ascertaining the cost of money. Thus, on February 5, 1954, he arranged a meeting in his office at First Boston with Harter and Cannon, vice presidents of First Boston's sales department, and Miller, an assistant in First Boston's buying department who had participated actively in the financing of the Ohio Valley project. As the Court of Claims summed up the results of this meeting: "Since Harter and Cannon were in touch with the securities markets, Wenzell asked for their best judgment on the interest rates that would have to be paid for funds borrowed to finance the construction of a plant similar to OVEC, taking into account three hypothetical bases of corporate capitalization * * *. After careful consideration of the problem, Wenzell was told that money could be obtained on the three hypothetical bases at the following respective interest rates: (1) 3½ percent, (2) 3½ percent, and (3) 3¼ percent. * * * Later, during the same day, Wenzell had a telephone conversation with Dixon [chief official of one of the sponsors] and advised him about the result of the meeting" (F. 58, R. 77).

Upon a request from Hughes of the Budget Bureau, "that further studies be made on other forms of capitalization and on different periods for repayment of the debt * * *" (F. 59, R. 77-78), Wenzell, on

February 10, 1954, "had another meeting at First Boston with Cannon, Harter, and Miller to obtain some further information on interest costs in relation to the longer period of amortization * * *. [T]he conclusion was reached that the loan could be made on the basis of an interest rate of 3½ percent" (F. 60, R. 78–79).

"[O]n February 23, 1954, Wenzell drafted an opinion letter which he showed to both Dixon and Hughes" (F. 67, R. 82). The letter contained a complete analysis of the problems of financing and concluded that the interest cost would not exceed 3½ percent per annum (see F. 67, R. 82–83). It is true that "[t]he draft prepared by Wenzell on February 23 was not formally executed by First Boston, but, if it had been signed and sent by First Boston, it would have substantiated the oral opinion previously obtained by Wenzell from First Boston and conveyed to Hughes and Dixon" (F. 67, R. 84). Indeed, as Raben of Sullivan and Cromwell had indicated, the question of whether First Boston formally signed the opinion letter "was purely academic since, in point of fact, Wenzell had already supplied the information to the Bureau and to Dixon, and the letter would amount to no more than confirmation of the oral information" (F. 72, R. 87).

Respondent attempts to minimize the quality of the information which Wenzell obtained by pointing out that "[n]o banking house has a monopoly upon money market information. * * * When asked for probable money rates, they come up with almost identical ones; in this case the various banking houses consulted did give identical information—3½% * * *" (Resp. Br.,

p. 16). The court below itself supplied the answer to this argument: "Wenzell could have obtained this information from other sources, but he was acquainted with the First Boston executives and considered that First Boston was one of the best and most reliable sources, if not the best source, of such information" (F. 58, R. 77). Moreover, the sponsors themselves wanted to obtain reliable financing information; indeed, their ultimate offer was primarily conditioned on such information (F. 67, R. 83; see *infra*, pp. 8, 15–16).

Respondent argues, however, that "[t]he information that Wenzell obtained from First Boston * * * was merely an estimate of what the interest rate would be if the market remained as it then was" (Resp. Br., p. 15), and that therefore "[t]he institutional investors were not concerned with First Boston's prediction, some months before, of what the interest rate would probably be; they were concerned with the actual interest rate they could get for their money in the then market" (*id.*, at p. 17). In so arguing, respondent implies that the estimate of future interest rate has little relevance to what the actual future interest turns out to be, and attempts to illustrate its argument by pointing out that the actual interest rate turned out to be "approximately 3.58%" (*ibid.*). Respondent's point may possibly have relevance to a situation in which the securities which are to be used to finance a proposed undertaking are put out on the open market; the whole thrust of its argument concerns "[b]anking houses [which] make competitive bids for bonds * * *," and it quotes some 1960 reports in the Wall Street Jour-

nal to illustrate recent competitive bidding on the open market for debt security issues (see Resp. Br., p. 16, and n. *). But the securities involved in the present transaction were not placed on the open market at all. The plan for financing involved the "direct placement" of First Mortgage Bonds and unsecured notes with insurance companies and banks (Fs. 114, 115, 117, 121, R. 111–113, 113–114, 115–116).[2] It was for this reason that the estimates by Wenzell and First Boston became so important to the Budget Bureau and the sponsors of the proposal.

The sponsors' concern about the interest rate, their desire for reliable information from First Boston, and the use to which they put the interest-rate information are amply illustrated by the findings below. As early as February 4, 1954, Dixon "engaged Hughes and Wenzell in a conversation about the cost of money for the project * * * [and later] asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates

[2] The plan, as actually worked out, provided for "bond purchase agreements, involving an estimated total commitment of $77,362,000 by the Metropolitan Life Insurance Company and New York Life Insurance Company * * * [and] bank credit agreements, involving an estimated total commitment of $27,086,000 by 24 banks * * *. The bonded indebtedness was to be secured by 3⅝ percent first mortgage bonds, and the debt to the banks was to be secured by the execution and delivery of notes bearing interest at 3¼ percent" (F. 195, R. 186).

The rest of the financing was done by Middle South and Southern which filed with the SEC on November 17, 1954 "an application to authorize plaintiff to issue 55,000 shares of its common stock having a par value of $100 per share and to permit Middle South to acquire 43,450 of such shares and Southern to acquire the remaining 11,550 shares, all having an aggregate par value of $5,500,000" (F. 192, R. 185).

in the then current money market would be for financing a project similar to the OVEC project" (F. 57, R. 76–77). On or about February 14, on the basis of the information which Wenzell obtained from First Boston, Dixon, Canaday, Vice President and Director of Middle South Utilities Co., and Seal, Vice President of EBASCO Services, "tried out the application of interest rates" and "made some tentative calculations on the basis of those rates" (F. 61, R. 79).

Moreover, "in reliance on the oral information previously given by Wenzell to Dixon as the opinion of First Boston * * *," Dixon and Yates included the following paragraph in their February 23 proposal:

> We have received assurance from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and *our offer is conditioned upon such consummation* [emphasis added] (F. 67, R. 83).

In addition, on March 2, 1954, Yates wrote a confidential memorandum to the directors of Southern pointing out, *inter alia*, "that First Boston had advised Middle South and Southern that the sponsors' bonds in the amount of $114,000,000 and bearing interest at 3½ percent could be sold to insurance companies under the current market conditions. This statement was based on the information Dixon had obtained from Wenzell and passed on to Yates before the proposal of February 25 was submitted" (F. 77, R. 91).

2. *Wenzell as a general expediter and cost consultant on the first proposal*—In the meantime, Wen-

zell also operated as one of the main middle-men between the Bureau of the Budget and the sponsors' group. In general, the Bureau looked upon him as the man to expedite the preliminary negotiations on the proposed project. Since Wenzell knew Dixon, McAfee, and Yates personally, and had had business relations with them in his capacity as Vice President and Director of First Boston in the past, "Hughes [of the Budget Bureau] asked Wenzell * * * to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter" (F. 46, R. 71; see also F. 61, R. 79).

Thus, when it was agreed at the January 2 meeting that "Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could generate 450,000 to 600,000 kw. of power across the river from Memphis in the territory of Middle South * * *" (F. 51, R. 74), it was Wenzell who was chosen by the group to "meet with Tony Seal of Ebasco * * * to inform Seal about * * * the substance of the discussions that had been held in Washington and * * * [to advise] him to get busy on an exhaustive study of the proposed project" (Fs. 53, 54, R. 75).

After the February 25 proposal had been submitted, Wenzell, at the March 1 meeting, "took the position that the estimates of costs in the February 25 proposal were too high" (F. 74, R. 89).[3] Prior to the time when

[3] There is some indication that Wenzell at first attempted to make the Dixon-Yates proposed costs look more reasonable than they were (see Tr. 1060–1061).

the Budget Bureau staff prepared a preliminary draft of its analysis of the February 25 proposal, the staff "had had the benefit of discussing it at considerable length with Wenzell" (F. 75, R. 90). At the March 9 meeting at the Budget Bureau, at which "all present [agreed] that the estimates of costs in the proposal were too high and that an attempt should be made to persuade the sponsors to submit a proposal more favorable to the Government * * *," it was Wenzell who was asked "to talk to Seal to determine whether the sponsors would submit a better proposal * * *," and it was Wenzell who later "told Seal that the cost estimates in the February 25 proposal were too high" (F. 84, R. 94).

On March 15, when "the final draft of the joint AEC-TVA analysis of the sponsors' [first] proposal was prepared and sent to the Bureau * * *," it was Wenzell who was handed, "[a]t Dodge's instruction * * * one copy of the draft * * *" (F. 89, R. 97). And on the next day, when "several representatives of the sponsors met in Dixon's hotel room in Washington and prepared a draft of a letter to Nichols of the AEC in reply to the joint TVA-AEC analysis of the sponsors' proposal * * *," Wenzell—while still a consultant to the Government—was furnished a copy of their draft letter, "and he made several changes in the letter in his own handwriting" (F. 90, R. 98). By March 24, it became "clear to the sponsors that their proposal of February 25 would not form an acceptable

basis for the negotiation of a contract" (F. 95, R. 100).

In light of all the tasks which Wenzell performed, it is difficult to understand how respondent can characterize his function as one in which he was only "from time to time to carry messages from Hughes to the sponsors to the effect that they should hurry with their proposals" (Resp. Br., p. 9), or "that the only 'decidedly significant' effect the activities of Wenzell may have had in connection with the February 25 proposal was the rejection of that proposal" (*id.* at p. 19). On the contrary, Wenzell's role was far more significant—as the explicit findings of the court below describe in detail.

3. *The relationship of the sponsors' first proposal to their second proposal.*—From March 26 to about April 1, 1954, the sponsors began working on a new proposal which they hoped would meet the objections raised with respect to their February 25 proposal. By April 10, the sponsors had worked out a second proposal which eventually served as the basis for negotiating the contract.

The thrust of respondent's argument with respect to the April 10 proposal is that there was a complete discontinuity between the February 25 and April 10 proposals, that they were "basically and significantly * * * different * * * " (Resp. Br., p. 24), that the April 10 proposal did not rest "'firmly upon the negotiations and analyses of the unsatisfactory first

proposal * * *'" (*id.* at p. 23), that "Wenzell's activities as a Bureau consultant related almost exclusively to the February 25 proposal, which was rejected" (*id.* at p. 25) since "after April 3 Wenzell ceased to serve as a consultant to the Bureau and performed no further services for the petitioner * * *" (*id.* at p. 21), and that "Wenzell did nothing as a Bureau consultant with respect to the April 10 proposal except to confirm the information on the probable cost of money" (*ibid.*). A review of the background of the transaction, however, will amply demonstrate the error of respondent's contentions.

The purpose of the negotiations between the Government and the sponsors was to develop a proposal by which the Memphis area power problem could be solved. The only alternative to the proposal being sought from the sponsors by the Government was the TVA project at Fulton, Tennessee—a project which had been stricken from the 1953 federal budget, and which had been rejected by the Congress in 1954 (F. 23, R. 57). This plan was to be reconsidered for submission to the Congress only if negotiations with Dixon's group fell through (see F. 41, R. 68). The sponsors knew that the President's budget message to this effect referred to them. No one else had been invited to submit proposals; no one else was asked to sit down with the Government and work out cost estimates which would compare favorably with the TVA project; no one else was made privy to the thinking of the Budget Bureau, the Atomic Energy Commission or to the TVA cost estimates. From January 20 to April 10, the Government and the sponsors talked, compared, analyzed, and bargained for a proposal

which the sponsors could stand by and which the Government could look upon as a basis for binding negotiations. Thus, the formulation of the proposal which, in fact, became the basis of the final binding negotiations for the contract was a continuous process extending over the entire period of Wenzell's service, which he did not consider ended until the second proposal was submitted (F. 105; R. 106).

Respondent has made much of the fact that, during the discussions, its first proposal, that of February 25, 1954, was rejected. It would have this Court believe that there was no significant relation between that proposal and the April 10 proposal which formed the immediate basis for the contract itself; that rejection of the February 25 proposal closed the door on all that had gone before; and that all the information about the alternative TVA project, all the discussion on over-all costs for the project, all the analyses as to the capacity of the plant, all the financing information which had been obtained, confirmed and reconfirmed, were put out of the mind of the sponsors while they spun out a new set of cost estimates in the record time of nine days—*i.e.*, on March 24, 1954, they were told that the February 25 proposal was not acceptable (although they did not withdraw it until April 10), yet, by April 3, 1954, they were able to come up with a revised set of cost estimates and were told that if they could submit "a new firm proposal" close to the estimates, such a proposal would deserve serious consideration" (F. 97, R. 100). In the face of this, we submit that it is patently absurd to contend that the February 25 and April 10 proposals are so distinct as to be completely different. They

were part and parcel of the same transaction, and formed steps in a continuing negotiation.

4. *Wenzell's role with respect to the second proposal.*—Moreover, respondent's characterization of Wenzell's role with respect to the April 10 proposal equally obscures Wenzell's significant contribution to that proposal. On April 3, at a meeting "called by Hughes for the purpose of discussing the sponsors' new cost estimates * * *, Wenzell confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money" (F. 97, R. 100–101). Later that afternoon, Nichols, the General Manager of AEC, "told Wenzell that the sponsors had by that time come close to submitting acceptable figures. He suggested that Wenzell encourage the sponsors to refine their figures and to submit a proposal based on a fixed price for the construction of new facilities, with details as to the basis upon which both the demand and energy charges were calculated" (F. 98, R. 101). And the Court of Claims has specifically found that Wenzell's function as a consultant to the Budget Bureau during the period from March 1, 1954, to April 3, 1954, "related principally to the *total costs of the project*" (F. 74, R. 89, emphasis added; see also F. 97, R. 100). These findings in themselves show that Wenzell did more than merely "confirm * * * the information on the [probable] cost of money" with respect to the April 10 proposal. He participated in the general consideration of all cost estimates.

But even if money cost had been the only thing with which Wenzell was concerned, its significance should

not be underestimated. It has already been shown that the cost of money was the single most important cost factor with respect to any proposal for the construction project (see *supra*, p. 3). Wenzell's oral opinion on April 3 was alone sufficient to cast him in a significant role with respect to the April 10 proposals. But Wenzell did far more than that. As the court below recounted in detail:

> Several days before April 12, 1954, * * * a representative of the sponsors either gave Wenzell a copy of the proposal for his examination or called him by telephone and read to him the following paragraph contained in the April 10 proposal:
>
> "We have received assurances from responsible specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and *our offer is conditioned upon the arranging of such financing.*"
>
> * * * Wenzell * * * compared the statement on financing in the second proposal with that in the first proposal, *ascertained that the second proposal contained substantially the same provision on the subject,* and knew that it was based upon the interest rate of $3\frac{1}{2}$ percent that he had obtained from First Boston.
>
> * * * [O]n April 9, 1954, * * * [Dixon] telephoned Wenzell, asking him to get the informed judgment of First Boston on the current cost of money. On * * * April 10, Dixon again talked with Wenzell by telephone and was told by Wenzell that it was the judgment of the First Boston that the interest rate would be $3\frac{1}{2}$ percent. *This information was relied upon*

> *by the sponsors in the drafting of the second proposal.* [F. 104, R. 105–106, emphasis added.]

To derive from this finding, as does the respondent, that there was a fundamental discontinuity between the February 25 and April 10 proposals, especially with respect to the particular function which Wenzell was serving, is clearly not justified.

Nor was this the end of Wenzell's activities. At a meeting on April 12, 1954, "the sponsors' representatives stated that * * * they wanted First Boston to give them a letter confirming the oral opinion of the interest rates given by Wenzell to Dixon on April 10. It was agreed that First Boston would give an appropriate written opinion" (F. 107, R. 106). The next day "Hallingby requested Miller to arrange for First Boston to sign the formal opinion letter regarding interest, as discussed the previous day. *Using the Wenzell draft of February 24, James prepared a draft of a letter to be signed by First Boston*" (F. 109, R. 107, emphasis added). The letter was dated April 14 and delivered to James that day (F. 109, R. 108). A mere comparison of the February 24 and April 14 letters indicates that they are worded in substantially the same terms (compare F. 67, R. 82–83, with F. 109, R. 108–109). In addition, Wenzell "participated to some extent" with Miller in "drafting a plan for the debt financing," shortly after May 7 (F. 114, R. 111–112).

Respondent, in answer to these findings of the court, insists that everything Wenzell did after April 3 had no significance with respect to the Govern-

ment's conflict-of-interest defense, since, after that date, Wenzell was no longer a consultant for the Budget Bureau (see Resp. Br., p. 22). Wenzell himself, however, "felt that his relationship with the Budget Bureau terminated on April 10, 1954, the date of the sponsor's second proposal" (F. 105, R. 106). But we do not rest on Wenzell's own view of the terminal date of his government relationship. It hardly seems possible that one may take himself out of the broad terms of 18 U.S.C. 434 by merely putting on different hats, but nevertheless continue to perform the same functions as had been performed prior to the "hat-switching" date. In the first place, the most crucial function which Wenzell performed on April 3 while he was still a Bureau consultant, *i.e.*, confirming the information which he had previously given the sponsors on the cost of money, must certainly be considered to have carried over into his analyses and comparison of the financing statement in the February 25 and April 10 proposals and his reconfirmation of the 3½ percent interest rate to Dixon on April 10.[4] Moreover, regardless of whether Wen-

---

[4] The findings also make it clear that Wenzell participated in the general discussions of cost estimates which directly preceded the formal presentation by the sponsors of the second proposal. See *supra*, p. 14, and also F. 97, R. 100: "On April 2, 1954, McCandless made a telephone call to Wenzell in New York, and on Saturday, April 3, Wenzell returned to Washington. On that date, he attended a meeting held at the [Budget] Bureau, where Hughes, McCandless, Adams, Dixon, Yates, Seal, and Canaday were also present. *The meeting had been called by Hughes for the purpose of discussing the sponsors' new cost estimates*" (emphasis added).

zell himself "considered that since his services with the Bureau had ended on April 10, he was acting as a representative of First Boston * * *" (F. 107, R. 107), it hardly seems possible to divorce First Boston's interest opinion letter from Wenzell's work as a consultant to the Budget Bureau merely because the letter was prepared on April 13, and delivered on April 14, in as much as the April 14 letter was based almost entirely on Wenzell's original letter of February 24. Finally, Wenzell's participation in drafting the debt financing plan was merely an outgrowth of his total activities with respect to both proposals while he was a consultant to the Budget Bureau. In short, the fact that Wenzell played no role in the ultimate negotiating of the contract should not obscure his very vital role in providing the reliable information on financing, upon which the sponsors' offer was conditioned, and his other work as expediter and cost consultant (see, especially, F. 104, R. 105).

5. *The close relationship of the accepted proposal to the ultimate contract.*—The close relationship between the February 25 and April 10 proposals and the vital role which Wenzell played with respect to those proposals have already been shown (*supra*, pp. 11–18). Respondent itself is willing at least to grant that Wenzell had a "slight contact with the April 10 proposal," but then nevertheless insists that Wenzell "had no contact whatever with the contract itself, and the contract was a document far different from the proposal" (Resp. Br., p. 30). Respondent refers to the negotiating sessions which began on July 7, 1954, and concluded on November 11, 1954, with the sign-

ing of the contract (F. 133, R. 120), attempts to make much of the fact that these negotiations began some three months after the April 10 proposal in order to emphasize Wenzell's remoteness from them (see Resp. Br., pp. 25, 29, 30-31), and insists that "[t]he contract grew out of these negotiating sessions—and only out of them * * *" (*id.*, at p. 31).

But the contract was not something which materialized out of thin air between July 7 and November 11; negotiations did not begin on a *tabula rasa*. There is no basis whatsoever for separating the negotiations of the proposal from the negotiations of the formal contract. The extraordinary amount of time and energy which was invested by Government officials, the sponsors and their executives, engineers, lawyers, and technicians in the formulation of a proposal which would be acceptable to the Government in the time period between January 20 and April 10 was not just mere preliminary sparring of no subsequent importance. Within fourteen days of the April 10 proposal, the Budget Bureau had already reported the results of its analysis to the President with the recommendation that the Bureau "be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors * * *" (F. 129, R. 119). It was only when the Von Treskow proposal (see our main brief, p. 8) intervened that the decision "to negotiate a contract with the sponsors *on the basis of the April 10 proposal*" was postponed (F. 129, R. 119, emphasis added). By the middle of June, after the Budget Bureau and AEC had worked out a comparative summary analysis of the two competing proposals, the President finally stated "that AEC would be in-

structed to proceed with negotiations *under the sponsors' proposal* for the purpose of entering into a *definitive contract within the terms of the proposal.* * * * On June 16, 1954, letters approved by the President were sent by Hughes [of the Budget Bureau] to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract *on a basis generally within the terms of the proposal* * * *" (F. 130, R. 119, emphasis added). The negotiations finally began on July 7 and ended on November 11, with the signing of the contract (F. 133, R. 120).

The details of the negotiations need not be recounted here; they are amply spelled out in the findings (Fs. 133–136, R. 120–122). As late as August 11, the sixth proof of the contract was still "within the terms of the proposal made by the sponsors on April 10, 1954" (F. 134, R. 121). To be sure, "there were numerous changes in and additions to the terms set forth in the proposal," and the sponsors "were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument"; nevertheless, the fact remains that "[i]n a general way, the contract was within the terms of the proposal" (F. 134, R. 121).

Thus, when it is considered that the information on financing given by Wenzell to the sponsors "was relied upon by the sponsors in the drafting of the second proposal" (F. 104, R: 106), that the interest opinion letter written by First Boston on April 14 was based on Wenzell's original draft letter of February 24 (*e.g.,* F. 107, R. 107), that Wenzell "participated to some extent" with Miller in "drafting a plan

for the debt financing" shortly after May 7 (F. 114, R. 111–112), which plan had its origin during the period of late January to early April, and that the contract itself grew out of the April 10 proposal which itself was part and parcel of the negotiations carried on from January to April (see *supra*, pp. 11–14), the only conclusion that can be drawn is that Wenzell's role in the transaction for the Government cannot be considered as insubstantial or remote.

II

DURING THE PERIOD WENZELL ACTED AS AN AGENT FOR THE UNITED STATES FOR THE TRANSACTION OF BUSINESS WITH DIXON-YATES, HE HAD AN INDIRECT INTEREST IN THE CONTRACT, WHICH WAS ULTIMATELY NEGOTIATED, AND THEREFORE CAME WITHIN THE SCOPE OF 18 U.S.C. 434

Respondent states as the general rule that, in order for there to be a conflict of interest, there must be "some understanding between the prime contractor and the prospective subcontractor during the time the public official is participating in governmental activities relating to the prime contract" (Resp. Br., pp. 57–58); "[i]n the absence of such relationship or understanding, any subsequent dealings between the public official and the government contractor are held to be immaterial in so far as the validity of the contract is concerned" (*id.* at p. 56). We do not agree that there must be an "understanding", in the sense of an explicit or implicit consensual agreement or accord, but we do concur that there must be a relationship making it likely that the prospective subcontractor (in which the official is interested) will ac-

tually become such a subcontractor of the potential contractor with which the official is dealing. Such a relationship plainly existed here.

Respondent's view of the facts is not at all that revealed by the findings and opinion below. Respondent maintains that "First Boston was not retained as one of MVG's financial agents until almost two months after Wenzell's active period as a Budget Bureau consultant ended (March 16 to May 12), and over one month after he ceased to serve as a consultant (April 3 to May 12)" (Resp. Br., pp. 35-36), so that Wenzell could hardly be considered to have had an indirect interest in the contract; rather, Wenzell "[a]t most * * * [only] had a hope that, if subsequently negotiations were decided upon by the Government and such negotiations resulted in a contract, and if respondent decided to use the services of a financial agent in negotiating financing with institutional investors, First Boston might get the job * * *" (*id.* at 54). This suggestion of an anemic "hope" is at war with the factual conclusions of the Court of Claims.

1. First, it is difficult to characterize the transactions in which Wenzell participated as evidencing "only a hope" or a slim possibility that the Government would enter into final negotiations, and that these negotiations would eventuate in a contract. On the contrary, the Court of Claims pointed up the virtual inevitability of the contract (R. 12):

> It hardly needs to be said that Wenzell and his permanent employer, First Boston, wanted

the explorations into the possibility of making a contract for the erection of a generating plant with private capital to eventuate in a contract. Their enthusiasm in this purpose equalled, no doubt, but could hardly have exceeded, that of the President of the United States and his Director of the Bureau of the Budget. Wenzell was not hired by the Director to discover reasons why a contract should not be made. * * * The Administration's * * * powerful urge to get a contract put it at a possible bargaining disadvantage, but no claim is made in this case that the contract which was made was an improvident one.

2. Moreover, the Court of Claims did not look upon the possibility that First Boston would get the financing agency as merely a fleeting hope; rather, the court believed that "[t]here was * * * a substantial possibility that * * * First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract". (R. 14).

It cannot be said, on the basis of the findings, that First Boston and Wenzell were not fully aware of this strong possibility of getting the financing contract and did not work actively to obtain it. Woods, the Chairman of the Board of First Boston, was firmly convinced that "the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in

connection with its power policy * * *" (F. 117, R. 114). As early as February 23, Wenzell had raised the conflict-of-interest problem with Hughes of the Budget Bureau. Wenzell's prime concern involved the draft interest opinion letter of February 24, which he had prepared on a First Boston letterhead. Since "First Boston was the source of the information in this draft," Wenzell was worried that, "if market conditions changed for the worse, the sponsors could use the draft as a moral commitment by First Boston, obliging it to arrange for the financing at the interest rates stated" (F. 69, R. 85). Needless to say, if Wenzell had not thought that there was a "substantial possibility" for First Boston to obtain the financing subcontract, he would not have raised the conflict-of-interest or moral commitment problems with Hughes.

Nor was Wenzell's concern only a momentary one. He had also raised with Raben of Sullivan & Cromwell, counsel for First Boston, the question as to "whether any problems would arise if it developed in the future that a proposal was accepted by the Government and First Boston was requested to arrange for the sale of debt securities" (F. 72, R. 87). Raben became so concerned about the problem that he cautioned Wenzell that "the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee" (*ibid.*), and Arthur Dean of Sullivan & Cromwell "felt that since Wenzell had served as a consultant to the Budget Bureau, First Boston might well handle the financing as a matter of public service and not accept any fee" (F. 72, R. 87–88).

Thus, the fact, as pointed out by respondent, that "as events turned out First Boston did not take a fee * * *, [and] therefore, had no pecuniary interest in the transaction * * *, [or] Wenzell * * * an indirect pecuniary interest through First Boston" (Resp. Br., p. 41), only emphasizes the attempt by First Boston to cure the situation in order to avoid the conflict-of-interest dilemma. But this attempt should not obscure the fact that Wenzell and First Boston had little doubt that First Boston would ultimately get the financing subcontract. Indeed, on March 9, Wenzell was quite candid in his concern to Director Dodge of the Budget Bureau as to "whether First Boston would be barred from participating in the financing because Wenzell had been employed as a consultant to the Bureau" (F. 85, R. 94-95). And by April 12, after Wenzell had submitted all financial data on interest and costs to the sponsors, "Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal" (F. 108, R. 107).

From this cataloging of Wenzell's discussions with respect to the financing, the Court should not be left with the impression that he did nothing more in order to realize his expectation. From the very beginning of his duties as a Budget Bureau consultant, Wenzell did much to involve First Boston intimately in the preliminary negotiations. As early as the January 20 meeting, "Wenzell thought that it was inevitable that various questions relating to financing an enterprise such as the OVEC project would arise at the * * * meeting and that it would be desirable to have

an expert available to answer such questions" (F. 49, R. 72). Thereupon, "[o]n his own volition and without consulting any representative of the defendant or of First Boston, Wenzell took with him Paul Miller, an assistant in First Boston's buying department. Miller had participated actively in the financing of the OVEC project in which First Boston had acted as financial agent for OVEC" (*ibid.*). Miller attended the meeting as a First Boston man.[5] Similarly, at the March 1 meeting, "Wenzell brought with him Powell Robinson, an assistant vice president of First Boston's sales department, who attended the meeting" (F. 74, R. 89). Beyond this, of course, every bit of information with respect to the cost of financing which Wenzell obtained, all the advice and considered opinions which Wenzell conveyed on this subject to the sponsors and the Budget Bureau, were prepared in close consultation with First Boston (see, *e.g., supra,* pp. 4–5, 15–16; and see our main brief, pp. 21–24).

In addition to these overt actions involving First Boston intimately in the negotiations, Wenzell appears also to have relied on his acquaintance with the Dixon-Yates group and his course of dealings with them. He had known Dixon, McAffee and Yates for many years because First Boston had done financing for them in the past (see, *e.g.,* Fs. 46, 65, R. 71, 80). At the very first meeting which Wenzell attended, on January 20, 1954, he made it a point to let Dixon

[5] In the proceedings before the Court of Claims, Miller admitted that even prior to April 22, he personally had hoped that First Boston would become the financing agent, and that he felt that first Boston and the sponsors were "all going in the same direction" (Tr. 793–794).

know "that during the previous summer he had made a confidential study for the Budget Bureau in Washington and had been recalled by the Bureau. He also told Dixon that he was attending the January 20 meeting as a representative of the Budget Bureau rather than as a First Boston man" (F. 53, R. 75).

As we have already indicated, the sponsors also acted as if there was a strong probability that First Boston would become the financial agent. They early evidenced concern over Wenzell's activities with respect to the possibility that he might be involved in a conflict of interest. During the third week in February, Wenzell, Dixon, and Daniel James, Dixon's counsel, had a discussion. James felt that "First Boston would receive first consideration as financial agent because of its experience on the OVEC project" (F. 68, R. 84). Dixon "asked whether Wenzell had considered the possibility that criticism and embarrassment might result from the fact that Wenzell, as an officer of First Boston, had been doing special work on a project for the Bureau of the Budget, if it later developed that First Boston should be employed to handle the financing of the same project" (F. 68, R. 84–85). Short of an absolute commitment, it hardly seems that at this early date the sponsors could have done more than they did to indicate that there was a "substantial possibility" that First Boston would become the financing subcontractor. This becomes especially clear when it is remembered that, on February 4, Dixon himself "asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a proj-

ect similar to the OVEC project" (F. 57, R. 76-77; see also *supra*, pp. 4-5, 7-8); on March 16, Wenzell arranged a meeting between Dixon, Yates and Linsley, Chairman of the Executive Committee of First Boston, "because Dixon wanted to make certain that the information given to him by Wenzell represented the opinion of some First Boston official like Linsley" (F. 86, R. 96); and, finally, "Dixon understood and believed that First Boston had been retained as of April 12, 1954, when First Boston was requested to issue the letter * * * and to advise Dixon on the procedure for obtaining a commitment of funds" (F. 116, R. 113).

In all these circumstances, the fact that the formal financing commitment from the Dixon-Yates group came shortly after Wenzell had left his position as consultant to the Budget Bureau cannot make a difference with respect to Wenzell's conflict-of-interest. In particular, as has been discussed in detail (*supra*, p. 10), the letter which First Boston was requested to issue on April 12, and which it did issue on April 14, was merely confirmatory of the oral information given by Wenzell with respect to the February 25 and April 10 proposals, and in fact was worded substantially the same as Wenzell's original interest opinion letter of February 24. The financial arrangements which were ultimately worked out stemmed directly from Wenzell's and First Boston's work during the months of January to April. Thus, to characterize the chain of events leading up to the retention of First Boston as "at most [only] a hope" that "First Boston might get the job" is to ignore the very vital

interrelationship of the sponsors, Wenzell, and First Boston from the very beginning. To be sure, Lehman Brothers was ultimately retained for 40 percent of the financing along with First Boston with 60 percent. Whether this move was presumably because "Lehman Brothers had some talents that would be helpful in connection with the financing of the project * * *" (F. 111, R. 110), or whether it had its origin in an attempt by Dixon-Yates to cure the conflict-of-interest situation, is of little importance, for the conflict-of-interest statutes are concerned not only with what actually happens but also with what *may* happen (see our main brief, pp. 59–62, 71–74). Congress laid down an across-the-board preventive rule of disinterestness, and it did not provide that the flat prohibition on a conflict-of-interest should cease to apply if it turned out, in a particular case, that no actual harm resulted or that the harm was somehow cured.[5]

III

THE CONTRACT WHICH FOLLOWED FROM THE TRANSACTIONS IN WHICH WENZELL PARTICIPATED IS UNENFORCEABLE UNDER THE POLICY OF 18 U.S.C. 434

The purpose of the conflict-of-interest statutes in general and of 18 U.S.C. 434 in particular has been discussed in detail in our main brief (pp. 35–42). Suffice it to repeat here that 18 U.S.C. 434 lays down

---

[5] It is no doubt for this reason that Congress became so alarmed over the Dixon-Yates contract and Wenzell's conflict of interest. See *Power Policy: Dixon-Yates Contract*, Staff Report of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Congress, 1st Sess. (Comm. print 1956).

a flat prohibition against the participation of any person in the contracts of any business entity in which he has an indirect interest if that person is acting for the United States in any transactions with the business entity (see our main brief, p. 36). The plain purpose of the statute is to protect the United States from the corrupting tendencies which alien economic interests may exert upon its representatives by preventing any Government agent from being tempted to advance such interest at the expense of the Government.

Although 18 U.S.C. 434 is a criminal statute which does not expressly provide that the consequences of a violation will be an invalidation of the contract originating from the unlawful transaction, the language and purpose of that statute look toward such a result. As was observed of a related conflict-of-interests statute: "The very comprehensiveness of the language used in every line of the section shows * * * a special effort on the part of Congress to make the remedy here as broad as the evil." 40 Op. A.G. 294, 300. Respondent's arguments to the contrary ignore both language and purpose.

1. Respondent maintains that "Congress deliberately refrained from including a blanket sanction of unenforceability in 18 U.S.C. 434" (Resp. Br., p. 63), and points to the legislative history of 18 U.S.C. 216, another conflict-of-interest statute which punishes a Government employee or Member of Congress for taking anything of value in aiding to procure a Government contract, to show that, even when Congress did consider the unenforceability of contracts,

it specifically abandoned a provision which would have made any contract obtained by such means automatically "'null and void'," in favor of a provision that such contract could only be declared null and void "'at the option of the President of the United States'" (Resp. Br., p. 64).

In thus citing the legislative history of 18 U.S.C. 216, respondent misconceives the issue. The problem in the present case is whether the contract should be enforced as if Wenzell had never had anything to do with it. Under the statute there is ample authority for the proposition that the contract may be considered invalid because of Wenzell's conflict of interests. It makes little difference on this record whether the contract be considered void or voidable, since the United States expressly disaffirmed the contract after its contracting agency (AEC) learned the whole story of Wenzell's activities.[7]

2. The absence of a provision making the contract unenforceable under the circumstances is not controlling; rather, it is necessary to look to the basic

[7] Wenzell's activities were not fully disclosed until after the contract was made. Nor did even the Budget Bureau learn that First Boston had been retained as financial agent until February 18, 1955—more than three months after the contract was signed (F. 127, R. 117-118). It was not until hearings before the Securities and Exchange Commission in December 1954 (F. 126, R. 117), and the subsequent hearings held by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, that the AEC had sufficient information to consider the effect of Wenzell's actions. It concluded, on the advice of its counsel, "that the contract was not an obligation which could be recognized by the Government." (F. 20, R. 56; F. 128, R. 118).

purpose of the statute and how the statute and similar enactments have been applied by the courts in specific instances. We have already shown in our main brief that, as a general rule, where a statute pronounces a penalty for an act, a contract founded on such act is unenforceable even though no specific provision is contained in the statute (main brief, pp. 68–72). This general rule is derived from the principle that a contract which contravenes or tends to defeat the purpose of legislation is against public policy. The rule and principle were amply explained and applied by this Court in the conflict-of-interest statutes relating to Government employees concerned with public land and Indian matters. *Prosser* v. *Finn*, 208 U.S. 67; *Waskey* v. *Hammer*, 223 U.S. 85, 93, 95; *Ewert* v. *Bluejacket*, 259 U.S. 129, 138. And the court below has applied the same principle to the statutory antecedents of 18 U.S.C. 434, in *Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258, 273, and in *Rankin* v. *United States*, 98 C. Cls. 357, 367.

Respondent, in an attempt to answer the Government's argument, insists that the sanction of invalidation of a contract under a penal statute may only be applied "where the alleged illegality was so inherent in the contract itself, * * * that the contract could not be enforced without giving judicial sanction to the judicial act" (Resp. Br., p. 66). Specifically, with respect to *Curved Electrotype* and *Rankin*, respondent attempts to distinguish them from the present case by stressing that in those cases "the acts of the Government official which were alleged to have bound the Government were in direct violation of the Act, * * *

the wrongdoer would have profited by enforcement of the contract, and * * * the court could not enforce the contract without giving judicial sanction to a statutory violation" (*id.*, at p. 72). But the illegality in this case was inherent in the contract itself because the very proposal which served as a basis for the contract depended upon all the work which Wenzell did while he served as consultant to the Government (see, especially, *supra*, pp. 20-21); Wenzell's activities were in direct violation of the Act. Wenzell had every reason to believe, at that time, that he and his firm *would* profit by enforcement of the contract, although in this instance he did not because of First Boston's decision not to take a fee; therefore, since Wenzell's activities violated the statute, any enforcement of the contract would in effect give judicial sanction to the type of infected bargain which Congress was seeking to prevent.

3. Respondent next argues that, since Wenzell did not have the power to make, and did not negotiate, the contract, and since First Boston did not take a fee, the enforcement of the contract would not require the Court to sanction Wenzell's activities (Resp. Br., pp. 70-71). But, after the transaction has been influenced by an interested representative of the Government, the consequences of that influence cannot be removed, *ex post facto*, by some curative unilateral gesture on the part of the representative or his employer. In this case, the gesture was a very slowly disclosed waiver of First Boston's fees. But the relevant period was while Wenzell was transacting business for the Government, and, during that period,

he had an indirect interest in the contract. The purpose of the statute is to prevent any temptation to advance personal interests at the expense of the Government; the statute is directed *at what could happen* as a result of a conflict of interest as well as what actually happens (see *supra*, p. 29). What happened subsequently, therefore, could not erase the effects of his activities on the transaction—activities which violated 18 U.S.C. 434 and which therefore put the entire transaction in doubt—a doubt which it was the purpose of the statute to eliminate.

4. Respondent's final argument is in effect that, even if there had been a conflict of interest, and even if enforcement could be denied, that remedy should be applied only against the wrongdoer (see Resp. Br., p. 72)—in this case Wenzell—so that, although First Boston might be unable to enforce a contract with the Government, Dixon-Yates, the third party, should be allowed to have the contract enforced. But as we have pointed out in our main brief (p. 77), contracts tainted by a violation of 18 U.S.C. 434 are not invalidated because the private contractor is guilty of complicity in the violation or because it failed to discern and effectively remove the infecting violation; invalidation is not fundamentally a sanction against the contractor, but a guarantee of the integrity of the federal contracting process. Congress desired that federal contracts be untainted by the possibility of a dual-interest, and therefore it provided the flat prohibition of Section 434. The enforcement of that prohibition cannot be frustrated by treating a tainted contract as valid because the suing party is innocent

of wrongdoing. The contract still remains infected with the prohibited conflict-of-interest.

The Court of Claims made much of the fact that Dixon-Yates could not have fired Wenzell because they had not hired him. But, as we have stressed in our main brief (pp. 78–79), if Wenzell had been a substantial stockholder of the Dixon-Yates companies themselves, the Dixon-Yates group would have been powerless to dismiss him from his Government employment or to sever his connection with their own company. Yet, the contract would have clearly been unenforceable. In the present case, it has already been shown in detail how deeply involved Dixon-Yates was with Wenzell and First Boston from the very beginning (*supra*, pp. 24–29). Despite the sponsors' professed concern about the conflict of interest, they continued to deal with Wenzell while he was a Budget Bureau consultant. Despite the fact that they never knew when he formally resigned, the sponsors continued to deal with him on the same basis as before his status was questioned (see main brief, pp. 74–75). Moreover, the sponsors continued to utilize the service of First Boston and ultimately retained it as a financial agent (see *id.*, at p. 76). The sponsors never even hinted to Wenzell or First Boston that, if Wenzell continued as a Government consultant, his company (First Boston) could not hope to become the financial agent for the project. But the Government was unaware of the retention of First Boston (and thus the fruition of the conflict of interest) during the entire period of contract negotiations from July 7 until No-

vember 11, and did not learn of the retention until February 18, 1955 (F. 127, R. 117-118; see *supra*, p. 31, n. 7). Dixon-Yates, on the other hand, was well aware of the conflict problem throughout the whole period. Under these circumstances, we submit that, if this contract were to be enforced, the courts would be giving judicial sanction to the violation of the statute.

5. Under the statute, the Government has a clear power to disaffirm because of the conflict of interest. Once the legislature has defined the objective circumstances of the kinds of conflicts and potential conflicts it considers dangerous to the integrity of public contracts, the right of the executive to rescind when those circumstances are present automatically follows. This principle is well illustrated by *City of Findlay* v. *Pertz*, 66 Fed. 427 (C.A. 6). In that case, an employee of a municipal gas works arranged for the purchase of certain equipment by the city. He received a commission from the seller upon each item purchased, in violation of a state statute forbidding municipal employees from being directly or indirectly interested in any contract for the purchase of property by their city. When the employee's interest was discovered, the city rescinded the contract. In the suit which followed, the Sixth Circuit distinguished between the contract of purchase, which was legitimate on its face, and the employee's commission arrangement, which was absolutely void. Noting that "[t]he means by which the city may have been induced to enter into it [the contract] was the vicious element in the trade".

(66 Fed. at 436), the court held that, in view of the violation of the statute, the city might repudiate or affirm the contract as it should elect.

In *Curved Electrotype Plate Co.* v. *United States*, *supra*, 50 C. Cls. 258, 272, the Court of Claims, in addition to its language deeming an express or implied contract made under prohibited circumstances absolutely void, also stated that, if "[t]he Public Printer [had assumed to] act for the Government so as to bind it when he had an interest direct or remote in the subject matter of the contract, * * * his contract could have been disaffirmed by the Government." Similarly, in *Rankin* v. *United States*, 98 C. Cls. 357, 367, the relationship of the Government to the tainted transaction was likened to that of a principal, who "on being informed of the participation of his agent on his own account and interest in a transaction * * * may disaffirm the contract so entered into without reference to any actual damage to the principal or benefit to the agent." This same principle was applied in *Crocker* v. *United States*, 240 U.S. 74.

The legislative history of 18 U.S.C. 216 (Act of July 16, 1862, 12 Stat. 577) (*supra*, pp. 30-31) itself reflects the congressional view that disaffirmance was a "common principle." The brief debate on the anti-bribery bill, S. 358, 37th Cong., 2d Sess., turned on whether a contract procured through bribery should be absolutely void, even if the Government wanted to affirm it. As a substitute for the inflexible proposal contained in the bill as reported, an amendment codifying the principle of disaffirmance was offered. Senator William P. Fessenden of Maine, a dis-

tinguished lawyer of his day, explained that "the amendment "is merely carrying out a common principle. The principle upon which it is rendered null and void is simply that the using of this kind of influence is really an imposition upon the Government, and the common principle is that the party who is imposed upon may consider the contract void if he pleases." 37 Cong. Globe 2958.

It must be remembered that the transaction here is a public one, not a private bargain. This difference is one which Wenzell and respondent do not appreciate. The standards of conduct acceptable for private bargains are not the same as the standards for a public contract; the ordinary morals of the market place will not do for a contract made on behalf of the nation. Section 434 extends the doctrine which obtains in the law of trusts to anyone who acts for the United States in a transaction. That doctrine "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity * * *. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of * * * duty may prevail over the motives of self-interest, but it provides against the

[8] Similar codification provisions, supplemented by certain additional remedies, were included in recent bills on conflict of interest laws before the Congress. See, *e.g.*, H.R. 1900, § 218, 86th Cong., 1st Sess.; H.R. 10575, § 12(c), 86th Cong., 2d Sess.; Hearings on Federal Conflict-of-Interest Legislation before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2d Sess., p. 482.

probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty." *Michoud* v. *Girod*, 4 How. 503, 555, quoted in *United States* v. *Carter*, 217 U.S. 286, 308–309. Under the clear policy of 18 U.S.C. 434, the United States had every right to disaffirm when all the facts were known to the contracting party. Under the facts of this case, it was under a duty to do so.

CONCLUSION

For the foregoing reasons, and for the reasons presented in our main brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OSCAR H. DAVIS,
Assistant to the Solicitor General.

RICHARD J. MEDALIE,
HOWARD E. SHAPIRO,
Attorneys.

OCTOBER 1960.

APPENDIX

Index to Individuals Named in the Findings[1]

Adams, Francis L.—Chief of Bureau of Power, Federal Power Commission (F. 85, R. 95).

Barry, J. M.—Chairman, Executive Committee, The Southern Company (F. 3, R. 49).

Canaday, Paul—Vice President and Director, Middle South Utilities Co. (F. 55, R. 76).

Coggeshall, James, Jr.—President, First Boston (F. 25, R. 58).

Clapp, Gordon, General Mgr., TVA (F. 36, R. 64).

Dean, Arthur—Attorney (Sullivan & Cromwell), Counsel to First Boston (F. 70, R. 86).

Dixon, Edgar H.—President, Middle South Utilities and MVG (F. 3, R. 49).

Dodge, Joseph M.—Director, Bureau of the Budget (1953–54) (F. 23, R. 57).

Donnelly, E. J.—Budget Examiner, Bureau of the Budget (F. 59, R. 78).

Grahl, James L.—Budget Examiner, Bureau of the Budget (F. 76, R. 91).

Hallingby, Paul—Assistant to President Dixon, Middle South (F. 62, R. 79).

Harter, Robert L.—Vice President, First Boston Corp. (F. 58, R. 77).

James, Daniel—Attorney (Cahill, Gordon), Counsel to Dixon (F. 68, R. 84).

Linsley, Duncan—Chairman, Executive Committee, First Boston Corporation (F. 25, R. 58).

---

[1] The record references are to the first instance in which an individual is mentioned and identified in the findings of the Court of Claims.

McAfee, J. W.—President, Union Electric Co. (F. 37, R. 65).

McCandless, William F.—Assistant Director for Budget Review, Bureau of the Budget (F. 37, R. 65).

Miller, Paul—Assistant in Buying Department, First Boston Corporation (F. 49, R. 72).

Nichols, Kenneth D.—General Manager, AEC (1954–55) (F. 39, R. 66–67).

Pilcher, Milton A.—Budget Examiner, Bureau of the Budget (F. 76, R. 91).

Raben, John R.—Lawyer (Sullivan & Cromwell) (F. 70, R. 86).

Roberts, Harold E.—Assistant to Adams, Bureau of Power, Federal Power Commission (F. 92, R. 99).

Robinson, Powell—Assistant Vice President, Sales Department, First Boston Corporation (F. 74, R. 89).

Schwartz, Carl H.—Chief, Resources and Civil Works Division, Bureau of the Budget (F. 73, R. 88).

Seal, Tony—Vice President, EBASCO Services, Inc. (F. 53, R. 75).

Smyth, Henry DeWolf—Member, AEC (F. 141, R. 125).

Strauss, Louis L.—Chairman, AEC (F. 37, R. 64).

Wenzell, Adolphe H.—Vice President and Director, First Boston Corporation (F. 24, R. 58).

Whittemore, James E.—Head of Public Utilities Department, Lehman Bros. (F. 111, R. 110).

Williams, Walter J.—General Manager, AEC (1953) (F. 37, R. 64).

Woods, George D.—Chairman of ~~the Board, First~~ Boston Corporation (F. 24, R. 57).

Yates, Eugene A.—Chairman of the Board, Southern (F. 4, R. 50).

Zuckert, Eugene M.—Member, AEC (F. 141, R. 125).

IN THE

Supreme Court of the United States

No. 26.

THE UNITED STATES

v.

MISSISSIPPI VALLEY GENERATING COMPANY

RESPONDENT'S PETITION FOR REHEARING.

TABLE OF CONTENTS.

CITATIONS.

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 26.

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To the Use of Others,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

RESPONDENT'S PETITION FOR REHEARING.

This petition for rehearing is based upon two points:

1. A legal point which for the first time at any stage in this litigation was raised in the Government's reply brief, served upon us less than two days before the argument and never briefed or argued by us, but which appears to have been adopted in the majority opinion; and

2. The serious misconceptions of fact on which the majority opinion is based.

I.

The opinion is based upon an important point of law which has not been briefed or argued by us.

Throughout this litigation prior to the service of its reply brief, the Government contended that if Wenzell violated 18 U. S. C. 434 the contract was absolutely void and unenforceable by respondent. We briefed and argued the case on the assumption that that was the issue. However, in the last four pages of its reply brief, which was served upon us less than two days before the oral argument, the Government for the first time advanced the proposition that the contract was merely voidable. As we read the Court's opinion, it has taken the same view: "The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest" (Op. p. 43).

Unfortunately, the Government's change of position escaped our attention while we were preparing for the oral argument, or we would have requested leave to file a brief in reply. For this approach changes the entire basis of the controversy and raises an issue the implications of which are of grave and far-reaching public importance: can the Government disaffirm this contract when, after disclosure of Wenzell's position and his removal, it proceeded with the negotiation and subsequent execution of the contract, and insisted upon contract performance as long as performance was deemed advantageous to the Government? Hasn't the Government thereby affirmed the contract? We respectfully ask the Court to order rehearing on this issue. In support thereof, we show as follows:

A.

Prior to the Government's Reply Brief, the Case was Presented and Argued on the Theory That the Government Had Refused to Pay under the Contract on the Ground That It Was Void, and not on the Theory That the Government Had Exercised a Right of Election to Disaffirm a Voidable Contract.

The origin of this lawsuit was the opinion of the General Counsel of the AEC on November 15, 1955, that, after reviewing the facts, "My conclusion is that there is a substantial question as to the *validity* of the contract which can only be settled in the courts" (F. 128, R. 118), followed shortly thereafter by a letter to respondent by the AEC stating "that upon the advice of its counsel, it had concluded that the contract was not an obligation which *could be recognized* by the Government" (F. 20, R. 56).*

The obvious import of that action is that the Government was not purporting to exercise a right of election to disaffirm the contract. It was acting on the assumption that the Government had no choice in the matter: If the contract was not a valid obligation of the Government it would be unlawful to pay out any Government funds under it.

That Government counsel so construed the Government's action is apparent from its briefs. Thus in the Court of Claims the Government stated that the question presented was whether Wenzell's activities "constituted such a conflict of interest as to avoid the contract" (Def. Br., p. 2).** Similarly in its principal brief to this Court, the Government stated the "Question Presented" as follows: "The ultimate question presented is whether the contract is a

---

* Emphasis added here and throughout this petition unless otherwise indicated.

** All four opinions in the Court of Claims deal with the question of whether the contract is void and contain no mention of the possibility that it was merely voidable.

valid obligation and enforceable against the United States" (Pet. Br., p. 2). In support thereof the Government argued that "The contract which followed from the transactions in which Wenzell participated is unenforceable under the policy of 18 U. S. C. 434" (Pet. Br., p. 67).

In our principal brief we argued that while concededly a contract involving a conflict of interest would be void as against the wrongdoer (here, under the Court's decision, Wenzell or First Boston), public policy did not require that the same rule be applied when the principal contractor had no conflict of interest and the wrongdoer would not profit by enforcement of the contract, particularly where the contractor disclosed the possibility of the conflict and brought about the wrongdoer's removal (Resp. Br., pp. 67-83). We did not argue the point presented in this petition.

B.

The Government's Belated Change of Position.

In reexamining the Government's reply brief in the light of the Court's opinion, we note that for the first time the Solicitor General abandoned his former position and conceded that there was a distinction between the rights of the wrongdoer and those of the contractor. Thus, at page 36, after stating that "Under the statute, the Government has a clear power to disaffirm because of the conflict of interest," the Solicitor General cites *City of Findlay* v. *Pertz*, 66 Fed. 427 (6th Cir. 1895), in support of the proposition that while the contract would be void as to the wrongdoer, it would be merely voidable as to the principal contractor, when it was not itself involved in the conflict.

In that case, a municipal purchasing agent had received secret commissions from the contractor's salesman on all

goods purchased by him for the city. As the Solicitor General pointed out: "In the suit which followed, the Sixth Circuit distinguished between the contract of purchase, which was legitimate on its face, and the employee's commission arrangement, which was absolutely void. Noting that '[t]he means by which the city may have been induced to enter into it [the contract] was the vicious element in the trade' (66 Fed. at 436), the court held that, in view of the violation of the statute, the city might repudiate or affirm the contract as it should elect" (Pet. Reply Br., pp. 36-37) (Interpolations in Pet. Reply Br.).

After arguing that, under the cases, the "right of disaffirmance" is "a common principle," the reply brief concludes: "Under the clear policy of 18 U. S. C. 434, the United States had every right to disaffirm when all the facts were known to the contracting party. Under the facts of this case, it was under a duty to do so" (Pet. Reply Br., p. 39).

Evidently, since we did not reply to this new contention, the Court was left with the impression that the contract had been duly disaffirmed by the Government upon discovery of Wenzell's position, and that consequently the only issues were (1) whether Wenzell had violated 18 U. S. C. 434, and (2) whether such violation rendered the contract voidable as to respondent: "The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest."

If that had been the issue tendered in the Government's principal brief, we would have conceded the point as a matter of law,* and argued first (as we did) that there had

* Moreover, if that is the issue, the legal arguments which we made in pages 61-91 of our principal brief are irrelevant and meaningless, since they are directed solely at the contention that the contract is absolutely void.

been no conflict, and secondly (as we did not) that in any event the responsible executive officials of the Government, from the President down, instead of disaffirming the contract had repeatedly affirmed it with full knowledge of Wenzell's activities. For on this record, if the contract is voidable, the issue is whether or not the Government has affirmed or disaffirmed. Moreover, in passing upon that issue, the very factual considerations which were held irrelevant in determining whether Wenzell had violated Section 434 are of primary importance.

For example, there is no doubt that, since this Court has held that Wenzell violated Section 434, neither he nor First Boston could recover anything under this contract. As to them it is absolutely void. And this would be so regardless of such questions as good faith, disclosure to his superiors, approval of his continuance as a consultant by his superiors, fairness of the contract, or any other equitable considerations. Obviously, no Government official can waive the provisions of the statute any more than equitable considerations can exempt a violator from its effects. Nor have we ever contended otherwise. As we pointed out in our principal brief, pp. 71-72, *Rankin v. United States*, 98 Ct. Cl. 357 (1943), and *Curved Electrotype Plate Co. v. United States*, 50 Ct. Cl. 258 (1915), clearly establish that one who has violated Section 434 cannot profit from the enforcement of a contract he negotiated or authorized on behalf of the Government, whatever equitable considerations may be advanced in his favor.

But on the question whether the Government has exercised its election to affirm or disaffirm the contract, those very equitable considerations are of primary importance. Can the Government disaffirm this contract when, after the contractor itself disclosed Wenzell's position and brought about his removal, the Government proceeded with the

negotiation and execution of the contract and insisted upon its performance as long as continued performance was desired by it, even after the charge of conflict of interest had been publicly made? That question has never been briefed or argued. Yet, as the Court's opinion stands, it holds that the Government may disaffirm under precisely those circumstances. The implications of such a decision are of such public importance that it should be fully briefed and argued before it becomes finally imbedded in our law.

C.

If the Contract is Voidable Rather Than Void, New Issues of Grave Public Importance are Presented.

The basic nature of the distinction between a determination that, as to respondent, this contract is voidable, rather than void, is well illustrated by the action taken on the floor of the Senate on this very issue, when the several statutes directed at conflicts of interest were first enacted. Some eight months before the predecessor of 18 U. S. C. 434 was adopted, the Senate Judiciary Committee's version of what is now 18 U. S. C. 216, the so-called "bribery statute," was being debated on the floor of the Senate. As reported out, the Section provided that "Every such contract or agreement, as aforesaid [*i.e.*: obtained by bribery] shall moreover be absolutely null and void." Addressing himself to this provision, Senator Fessenden of Maine spoke as follows:

> "I would suggest an amendment that I think would be advisable. It may be that a contract or agreement procured in this way may be a valuable contract for the Government, and I would therefore suggest an amendment in the sixteenth and seventeenth lines, so as to make it read, 'and the President is hereby authorized to declare such contract or

> agreement to be absolutely null and void.' Let the Government avail itself of it if it so pleases. I suggest to the Senator from Kentucky whether it would not be advisable to leave it at the option of the Government'' (Cong. Globe, 37th Cong., 2d Sess., p. 2958 [June 27, 1862]).

After some debate this amendment was adopted in the following form: "Any such contract or agreement, as aforesaid, may, at the option of the President of the United States, be declared absolutely null and void'" (*Ibid.*).

It is not reasonable to contend, as did the Government in the court below and in its principal brief to this Court, that public policy requires the court to import into the companion statute, now 18 U. S. C. 434, which is silent on the question of contract enforceability, the very provision which Congress rejected on grounds of public policy when enacting the statute directed at the more serious offense of bribery (see Resp. Br., p. 64). It is far more appropriate that, since the Court has held that a "sanction of unenforceability" is to be imported into the statute, it should be cast in terms of voidability, rather than in terms of outright invalidation.

That this is not an antiquated view is apparent from the current report of the distinguished Special Committee of the Association of the Bar of the City of New York on the Federal Conflict of Interest Laws, recently published under the title "Conflict of Interest and Federal Service" (Harvard University Press, 1960). After an exhaustive review of the entire subject, the report annexes a proposed new statute designed to deal with the problem.* Section 12(e) of that proposed statute reads as follows:

* This proposed statute is now pending before Congress: S. 603, H. R. 3050, 87th Cong., 1st Sess. (1961).

"SEC. 12(c) *Rescission of Government action.*

The President or any agency head may cancel or rescind any Government action without contractual liability to the United States where

(1) he has found that a violation of this Act has substantially influenced such Government action; and

(2) in his judgment the interests of the United States so require under all of the circumstances, including the position of innocent third parties."

The Committee's report adds the following comment: "Subsection (c) provides a statutory base for the common law principles of rescission" (*Id.* at 302).

According to *Restatement of Contracts*, Section 483, the common law principles of rescission applicable to the situation at bar are as follows:

"483. Loss of Power of Avoidance by Failure to Notify the Other Party.

(1) The power of avoidance for fraud or misrepresentation is lost if after acquiring knowledge thereof the injured party unreasonably delays manifesting to the other party his intention to avoid the transaction.

(2) In determining the unreasonableness of delay the following circumstances are influential:

(a) the speculative character of the contract whereby prolongation of the power to affirm or to avoid would give an advantage to the injured party or increase the loss of the other party;

(b) the likelihood that the party guilty of the fraud or misrepresentation will materially change his position, *or the welfare of a third person be unjustly prejudiced by delay*;

(c) the fact that change of position by the party guilty of the fraud or misrepresentation, *or prejudice to a third person, has in fact occurred during a period of delay in manifestation of intention.*"

As this Court stated the rule in *Shappirio* v. *Goldberg*, 192 U. S. 232, 242:

> "It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract."

To the same effect, see *City of Findlay* v. *Pertz, supra*, 66 Fed. at 439-40.

The same rule is applicable to contracts of the United States. For example, in *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186, the Government was not permitted to disaffirm a contract of sale for alleged imperfections when it had neither inspected the goods nor rejected them within a reasonable time. As this Court pointed out in that case (268 U. S. at 188): "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Smoot's Case*, 15 Wall. 36, 47; *Manufacturing Company* v. *United States*, 17 Wall. 592, 595; *United States* v. *Smith*, 94 U. S. 214, 217."

As Mr. Justice Brandeis said, writing for a unanimous Court in *Lynch* v. *United States*, 292 U. S. 571, 579: "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

There is a substantial difference between the exercise of a right of election to disaffirm a voidable contract and a refusal to perform the contract on the ground that it is void and unenforceable: the latter involves no act of volition and no exercise of discretion. Nor can any equitable considerations be considered. The issue is exclusively for judicial determination: if the contract is void as a matter of law, it can not be enforced regardless of whether or not the Government wishes to enforce it.

On the other hand, the question of whether to affirm or disaffirm a voidable contract is purely a matter for the executive branch. The only question subject to judicial inquiry is whether and in what manner the right of election may have been exercised. Moreover, in the judicial determination whether the right to affirm or disaffirm has been exercised, the very equitable considerations which this Court has held irrelevant in determining whether Section 434 has been violated become of primary importance. Concededly if the contract is void as a matter of law under the provisions of 18 U. S. C. 434, not even the President could waive the statute and render the contract valid. But there can be no doubt that if the contract is voidable the executive branch can affirm or disaffirm, and neither the wisdom nor reasonableness of its action is subject to review.

On three separate occasions the Government, acting through its highest executive officials, including the President himself, was confronted with the necessity of either affirming or disaffirming the contract, and in fact affirmed it on each occasion: (i) the negotiation and execution of the contract after the sponsors' disclosure of Wenzell's position and his removal from the Government for that very reason; (ii) the Government's insistence upon prompt performance of the contract for nearly five months after

Wenzell's position was concededly known to everyone in the Government concerned with the contract; and (iii) the action of the President after the cancellation of the contract in directing the negotiation of an agreement on termination costs.

Thus even if the Government's action in repudiating the contract on November 23, 1954, on the ground that it "was not an obligation which could be recognized by the Government" (F. 20, R. 56) could be construed as an exercise of the Government's right of election to disaffirm, it came too late. The Government had repeatedly taken actions to affirm.

D.

The President Directed Negotiation and Execution of the Contract After Disclosure of Wenzell's Position and the Termination of his Government Services.

As the Court of Claims found, "On April 24, 1954, Hughes [then Director of the Bureau of the Budget] sent the President a memorandum, reporting the results of the analysis [of the second proposal] and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors. * * *" (F. 129, R. 119). Again on June 14, 1954, a comparative summary analysis of costs under the sponsors' proposal and other similar proposals "was presented by Hughes and Strauss to congressional leaders in conference with the President. At that time the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. * * * On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with

a view to signing a definitive contract on a basis generally within the terms of the proposal * * *" (F. 130, R. 119).

By April 24, 1954, Hughes knew substantially all the facts which, the Court has now held, rendered the contract voidable: that Wenzell was a Vice President of First Boston (F. 69, R. 85); that he had been disturbed lest some impropriety might be charged if he continued his services to the Bureau, contract negotiations should be authorized, and First Boston should be retained as financial adviser to the sponsors (F. 69, R. 85); that Wenzell's own lawyers, as well as Dixon, were equally disturbed over this possibility and had advised Wenzell to resign immediately (F. 78, R. 92); that, while Dodge had agreed with Hughes that there was no immediate problem, Dodge had advised Wenzell to terminate his services as quickly as possible if there was any likelihood that First Boston would become involved (F. 85, R. 95);* that thereafter he himself had directed Wenzell to turn everything over to Adams of the FPC (F. 92, R. 99); that Wenzell had done so on March 23rd and had attended only one more Budget Bureau meeting as a consultant, on April 3rd, on which day his services ended (F. 106, R. 106); that Wenzell's only contribution to the sponsors' second proposal, which was to form the basis of the contract negotiations which Hughes recommended,

* At the time Wenzell spoke to Hughes and Dodge, their opinion was that no violation of 18 U. S. C. 434 had occurred and no serious problem was presented, since a long time would elapse before contract negotiations would commence and any question of financing would arise (Fs. 69, 85, R. 85, 95). Their opinion can hardly be deemed to be unreasonable, since six of the fourteen Judges who have passed on this case have come to the same conclusion. Similarly James, when he raised the point of Wenzell's position with Dixon and subsequently with Hughes, and Arthur Dean, counsel for First Boston, when he told Wenzell to resign immediately, felt that no violation of Section 434 had taken place (Fs. 68, 72, R. 84, 87); and the same reasonableness must be attributed to their views.

had been to reaffirm his estimate of the probable cost of money (Fs. 95, 97, R. 100-01); and that, on April 10th, immediately prior to the time the sponsors submitted their second proposal, it had been agreed between Dixon and Nichols, general manager of the AEC, that only the actual cost of money, and not Wenzell's estimate, would be binding on either party (F. 102, R. 103-04). Thus, even if the reasonableness of the action taken by the President on the recommendation of his own appointee were subject to judicial review, the record shows that it was quite reasonable for Hughes to have determined, on the basis of these facts, that Wenzell's former involvement presented no obstacle to his recommendation that contract negotiations be instituted.

The Court's opinion makes much of the fact that Hughes did not know of the retention of First Boston in late April or May, because Wenzell did not fulfill his promise to Dodge (or follow the instructions that he had received from First Boston's counsel) to disclose the retention of First Boston to the Bureau of the Budget. However, the record discloses that at the very first meeting between respondent's representatives and representatives of the Government after the retention of First Boston, *respondent's representatives* did inform the Government representatives of that fact (Fs. 126, 133, R. 117, 120).

To be sure, at that time, since contract negotiations were about to be commenced, respondent was dealing with the AEC, and not the Budget Bureau, for the negotiation of the contract was not a function of the Budget Bureau (F. 45, R. 70). Moreover, it appears that the AEC may not have passed on this information to the Budget Bureau (F. 127, R. 118).* But we question whether a contractor

* It has not been suggested, and there is no evidence, that respondent's representatives were aware of Wenzell's promise to disclose this fact to the Bureau.

who is dealing with the Government and makes full disclosure of pertinent facts to the Government officials with whom he is dealing, can be held to account because those officials did not pass on the information to other interested officials or agencies.*

But in any event, as Hughes knew, the express reason why Dodge advised Wenzell to terminate his services as soon as possible, was the "likelihood that First Boston might participate in any financing which developed in the future" (F. 85, R. 95). Since, as this Court points out (Op. p. 38), it was the existence of that "likelihood," and not the subsequent retainer of First Boston, which rendered the contract voidable, it is difficult to see the significance for present purposes of the fact that First Boston was in fact retained.

When a prospective Government contractor calls the attention of the agency head with whom he is dealing to the fact that one of the agency's consultants may in the future find himself in a position involving a conflict of interest, the consultant is thereupon removed, both parties agree not to be bound by the advice he has given (F. 102, R. 103-04), and the responsible agency head thereafter recommends the initiation of contract negotiations (F. 129, R. 119), the Government cannot thereafter disaffirm the resulting contract because of the consultant's participation in the earlier discussions. On the contrary, under such circumstances the Government will have affirmed the resulting contract.

---

* The same question is raised by the Court's reliance on the fact that while at the time the sponsors were dealing primarily with the Bureau, for whom Wenzell was acting, they informed the Bureau of his position, but apparently no one separately advised the AEC (although the record discloses that Williams and Cook of the AEC were aware of Wenzell's situation) (F. 126, R. 117).

Certainly, at common law and between private parties, such actions would preclude the allegedly "injured party" from later disaffirming. We perceive no public policy which would require a different rule when the Government is engaging in contract negotiations with *private parties* who are not themselves involved in a conflict of interest. As this Court has said, "* * * the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party" (*United States* v. *Smith*, 94 U. S. 214, 217).

The enormous extent to which almost every phase of Government activity, in its many manifestations, from national defense to federal aid, is carried out by private contractors, is subject to judicial notice by the Court. The Court can also take judicial notice of the fact that in a Government establishment employing over 2.4 million civilians in various capacities, many of them recruited from the business community, in addition to a slightly larger number in the armed forces,* it is inevitable that Government contracting officers will be repeatedly confronted with situations involving an actual or potential conflict of interest—particularly in the preliminary and exploratory phases which generally, as here, precede actual contract negotiations.**

What, then, are either the private contractor or the Government contracting officer to do when confronted with such a situation? At common law, the answer is well settled: Upon disclosure of the problem, remove the potential offender, reexamine or disregard any advice he may have given, and proceed to negotiate a contract. And that is precisely what the regulations of the three governmental

---

* "Conflict of Interest and Federal Service", *supra*, p. 8.

** See *id.* at pp. 121-80 for an illuminating discussion of this problem.

departments and agencies here involved (Budget, Atomic Energy, and Justice) prescribe.* Yet as we read this Court's opinion, when the Government is negotiating a contract, that procedure is ineffective and the departmental regulations meaningless: at any time in the future, regardless of disclosure, removal of the offending person, mutual agreement not to be bound by whatever he did, and insistence by the Government upon continued performance, the contract could be disaffirmed by the Government whenever it wished to be relieved of its contractual obligations.

Surely the Court did not intend to establish a rule which would present such an insuperable obstacle to anyone contemplating a contract with the Government. For the obstacle *is* insuperable; in a case such as this, where the contractor must borrow large sums of money to finance performance of the contract, the problem has no solution under the majority opinion. The record in this very case shows what lending institutions require in this regard. For example, Exhibit D to the 3⅝% Bond Purchase Agreement dated April 21, 1955, which was entered into in identical form with Metropolitan Life Insurance Company and New York Life Insurance Company (Pl. Ex. 43), sets forth the opinions which the bond purchasers would have demanded of counsel for Mississippi Valley Generating Company and of their own counsel before any loan would have been made. Those opinions would have had to provide that certain agreements, including the Power Contract, "are *valid agreements* duly authorized, executed and delivered by the respective parties thereto, are in full force and effect * * * and are *legally enforceable in accordance with their respective terms.*"

---

* See our principal brief, pp. 84-85. Moreover, it is what the revised Conflict of Interest statute recommended by the Special Committee on the Federal Conflict of Interest Laws expressly recommended. "Conflict of Interest and Federal Service", *supra*, pp. 245, 302.

The foregoing is the usual type of requirement in a financing transaction. The officers of institutional lenders are in a fiduciary position and would be derelict if they lent sums of money on the basis of security which might ~~turn out~~ to be illusory. Similarly, underwriters would be derelict and chargeable if they represented as security something which might be made to disappear at the option of the Government.

Thus, under the majority decision, Government contracts which have heretofore enjoyed unsurpassed integrity as security for financing transactions suddenly find themselves virtual South Sea Bubbles. The only way to avoid this result would be for this Court, upon reconsideration, to reestablish the usual rule which has heretofore been applicable at common law: where the existence of a potential conflict is called to the attention of the party who might be injured, and that party takes reasonable action to protect itself from any resulting damage and thereafter proceeds with the negotiation and execution of a contract, the contract can no longer be disaffirmed because of the alleged potential conflict.

E.

The Government Demanded and Obtained Performance of the Contract For Nearly Five Months After All Government Officials Associated With the Contract, From the President Down, Had Knowledge of the Charges Against Wenzell, and Cancelled the Contract Only When, Owing to the Fortuitous Intervention of the City of Memphis, the Government No Longer Desired Further Performance.

Even if there were any significance to the fact that during the time of contract negotiations the AEC did not know as much about Wenzell as did the Bureau of the Budget, and *vice versa*, the record discloses that in Decem-

ber, 1954, the AEC learned that "Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project." (F. 126, R. 117), and the Bureau of the Budget learned of First Boston's retention not later than February 18, 1955 (Op. p. 25) (F. 127, R. 118). Moreover, as the Court points out, on the latter date "Senator Lister Hill of Alabama made a speech criticizing the activities of Wenzell and First Boston and emphasizing Wenzell's conflict of interest" (Op. p. 24). Nevertheless, the Government continued to insist upon expeditious performance of the contract by respondent for some five months thereafter, and did not cancel the contract until July 11, 1955 (F. 19, R. 55) when, because the City of Memphis undertook to produce its own power, "the power to be generated by the proposed plant was no longer needed" (Op. p. 2).

Moreover, on March 17, 1955, Hughes, who by that time knew everything that was to be known regarding the activities of Wenzell and First Boston, wrote Vogel of the TVA, in reply to a request from two TVA directors that the Budget Bureau reconsider the advantages of the Dixon-Yates contract as compared with the discarded Fulton plant, "that the Dixon-Yates contract was then in effect; that it would accomplish the purposes set forth in the President's budget message; and that there was no reason for exploring other methods to provide additional generating plants for TVA * * *" (F. 158, R. 150).

In May of 1955 the Government filed a brief *amicus curiae* in support of the validity of the contract with the Court of Appeals for the District of Columbia on the appeal from the S. E. C. order approving respondent's equity financing for the performance of this contract, in which it stated that "the power contract was negotiated, executed;

and has been administered with an extraordinary measure of disclosure to the Congress and the public" (Pl. Ex. 28, p. 31).

It is plain from the foregoing that the Government, with full knowledge of all the circumstances, manifested an intention to perform the contract as long as performance was advantageous to it.

Nor is this action surprising, when it is borne in mind that the purpose of the enterprise was to aid in carrying out the Government's declared policy to eliminate all possible expense items so as to achieve a balanced budget, and that the Chairman of the AEC had publicly stated on December 17, 1954, that:

> "The contract with the Mississippi Valley Generating Company is reasonable and fair to the Government and therefore to the American taxpayer. It avoids an immediate appropriation of $100 million tax dollars for the construction of an additional steam plant for TVA * * *" (Def. Ex. 219A, pp. 21-22).

The Chairman reaffirmed this on the trial of this case (Tr. 1476). Hughes testified to the same effect (Pl. Ex. 148, pp. 14-20). Moreover, the Solicitor General has expressly conceded that "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59).

Thus, the situation was precisely that which Senator Fessenden foresaw when he moved the substitution of "voidable" for "absolutely void" at the time the bribery statute was enacted: "It may be that a contract or agreement procured in this way may be a valuable contract for the Government * * *. Let the Government avail itself of it if it so pleases." It is inconceivable that the contract would ever have been disaffirmed because of Wenzell's

activities if such a disaffirmance would have required the addition to the Budget of an item of over $100,000,000 for the construction of the plant at Government expense. This is apparent from the testimony of the Chairman of the AEC before the Kefauver Committee on December 5, 1955, after the contract had been repudiated on the ground that it was void, and only eight days before the filing of the complaint in this case. After reiterating his belief that "the contract was a good contract" he added "I thought so at the beginning, I still think so, despite the fact that in the public interest the President has decided that Memphis is to get its power by local financing, and that he ordered us to bring the contract to an end * * * *and despite the fact that the conflict-of-interest question has been raised* * * *." *Power Policy—Dixon-Yates Contract*, Hearings before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, United States Senate, 84th Cong., 1st Sess., p. 1156 (1955).

Again, the Government with full knowledge of the charge of conflict of interest, was confronted with the choice of whether to continue to exact performance from respondent or disaffirm the contract, and the Government continued to exact performance. It thereby affirmed the contract, if it had not already done so.

F.

Even After the Contract Was Cancelled Because It Was No Longer Needed, the President Directed the AEC to Seek an Agreement With Respondent as to the Amount Due for Termination of the Contract, Subject Only to Whether the Contract Was Void.

Finally, the findings show that even after the President determined to cancel the contract "because in the interim the City of Memphis had decided to construct a

municipal power plant, thereby obviating the need in that area for TVA generated power" (Op. p. 10), not only the Chairman of the AEC but the President himself directed that negotiations be instituted looking towards an agreement as to how the termination of the contract should be carried out, subject only to the reservation of "the question of whether the contract was valid" (F. 21, R. 56):

> "19. On July 11, 1955, at about 5 p. m., plaintiff was advised by telephone by the Chairman of AEC that the President of the United States had decided to order termination of the contract. On August 1, 1955, the oral notice was confirmed in a letter from AEC to plaintiff. *The letter expressed the hope that it would be possible for the parties to agree on a mutually acceptable basis for bringing the contract to an end.*
>
> "20. On July 12, 1955, representatives of plaintiff met with the President of the United States, and thereafter there was a series of meetings with representatives of AEC.* In compliance with a request from AEC, plaintiff supplied estimates of termination costs * * *. The post-termination discussions were broken off by AEC in October 1955, and on November 23, 1955, AEC wrote plaintiff that upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government" (Fs. 19, 20, R. 55-56).

After the President's meeting with respondent's representatives* on July 12th the White House issued the following statement:

> "* * * The President stated that he hoped that in the termination of the so-called Dixon-Yates con-

* It was Mr. Dixon and one of his associates who were invited to the White House to meet with the President, who greeted Mr. Dixon by stating, "I am glad to see a man that can take it on the chin like I think I can" (Tr. 126).

tract the best interest of the community and the government will be served but that at the same time no injustice will be done to the Mississippi Valley Generating Company. He said that the so-called Dixon-Yates contract was a good, fair agreement, and he praised the good will with which the company officials have accepted the government decision to terminate it—a decision predicated on Memphis' announced plan to build its own steam generating plant and meet its own power needs" (Pl. Ex. 144).

There can be no question but that everyone in the Government, including the President, was fully aware of the possible existence of a defense of conflict of interest at this time. Yet the only action taken was that "at the meetings between plaintiff and the AEC after the contract had been terminated, AEC reserved the question of whether the contract was invalid because of a conflict of interest" (F. 21, R. 56). The only reasonable construction that can be placed upon the Government's action in continuing to negotiate termination costs under such a limited reservation, is that the Government intended to pay respondent's termination costs unless it was prohibited from doing so as a matter of law because of the invalidity of the contract.

Under all the circumstances here present, it is unthinkable that the President would have tried to disaffirm, even if he had been advised that he had a choice in the matter. He would have been guided by the following considerations: Respondent had engaged in this enterprise at the express request of the President's own appointees, the Director and Deputy Director of the Budget and the Chairman of the AEC, in order to carry out a policy which he himself had announced and espoused because he believed it was in the public interest (Fs. 22, 36, 37-39, R. 56-57, 63-64, 64-67). It was his own appointees who had brought Wenzell into

the situation (Fs. 45-46, R. 70-71), and the alleged "taint" in the contract arose solely because those appointees had urged Wenzell to disregard the advice of the respondent's representatives and his own counsel that he resign immediately (Fs. 68, 69, 72, 78, 85, R. 84-85, 86-88, 91-92, 94-95). The costs incurred by respondent had been incurred at the express request of his own appointees*, and for the purpose of carrying out his own policy of eliminating an item of over $100,000,000 from the Budget (Fs. 22, 23, 36, R. 56-57, 63). As a result of their efforts in executing and performing the contract, until the fortuitous intervention of a third party obviated its necessity, that policy had been accomplished (F. 206, R. 192-193). Moreover, as is apparent from the above-quoted press release, he agreed with his appointees in both the AEC and the Bureau of the Budget (and with the position taken by the Government in its brief [Pet. Br., p. 59]) that the contract was fair and honest and a good contract from the standpoint of the United States. Finally, since the cancellation provisions of the contract provided only for repayment of respondent's out-of-pocket costs incurred in performance of the contract prior to its cancellation, and not for any loss of profits, the President would have known that there could be nothing unconscionable in the amount of the recovery.

While the Court has held that none of these circumstances is relevant in determining whether as a matter of

---

* It is to be borne in mind that, with the exception of such inconsequential expenses as may have been incurred in preparing the first proposal of February 23, 1954, all of the expenses included in the judgment below were incurred by respondent and the use-plaintiffs as a result of the Government's action in insisting upon the negotiation, execution and performance of the contract, after respondent had disclosed Wenzell's position to his Government superiors.

law the contract is voidable, there can be no doubt that they are highly relevant to a determination by the President as to whether or not to exercise his right to disaffirm. Moreover, the President's above-quoted statement shows that at least some of these considerations were in his mind when he directed that an attempt be made to reach agreement between the respondent and the Government under the termination provisions of the contract.

In the light of these facts, a decent regard for the reputation of the Government for fair dealing would dictate the action taken by him in directing that steps be taken to repay respondent's out-of-pocket expenses if it were legal to do so. Certainly there is nothing in the record on the basis of which an intention can be imputed to the President deliberately to place himself and the Government in the "far from ingratiating" position (Dissenting Op., p. 1) of welshing on an agreement to reimburse respondent for expenses which he believed had been honestly incurred at his request in order to assist the Government in carrying out a policy which, in his opinion, was in the public interest, simply because he may have had a technical legal right to do so.

Once again, the facts compel the conclusion that the Government, acting by its highest official, when confronted with the choice of affirmance or disaffirmance, and with full knowledge of all the circumstances, unmistakably rejected disaffirmance and took action which can be construed only as an affirmance.

G.

Under the Facts of This Case the Public Policy Embodied in 18 U. S. C. 434 Would Not Be Promoted By Permitting the Government to Disaffirm Without Even Paying Respondent's Out-of-Pocket Costs.

As we understand the majority opinion, public policy requires strict enforcement of 18 U. S. C. 434 for two reasons: first, the *in terrorem* effect of such enforcement as a preventive measure; and second, protection of the Government from the possibility of loss resulting from acts of disloyal public servants.

The *in terrorem* effect, of course, operates against wrongdoers and prospective wrongdoers; and the first purpose mentioned above is therefore completely fulfilled by the Court's unambiguous holding that, under no circumstances and regardless of equitable considerations, can either Wenzell or First Boston profit in any manner from the offending contract.

The second purpose—"to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction" (Op. p. 42)—cannot be served by denying recovery in this case. The amounts allowed to the plaintiff and use plaintiffs by the court below were not fixed by the contract. On the contrary, the reasonableness of those costs was determined by the court itself after extended hearings resulting in findings to which no one excepted.

All that would be recovered under the decision below would be judicially determined costs incurred by respondent at the urging of the AEC in order that respondent might put itself in a position to perform the contract. Therefore, by analogy to *Crocker v. United States*, 240 U. S. 74, cited by the majority opinion at page 42, respondent should be permitted to recover its costs. Respondent

is not seeking performance of the contract or damages for breach. It is not seeking anything which could have been affected by Wenzell.

Under these circumstances, from the standpoint of the Government's reputation for common fairness in its business dealings, it would be in the public interest to permit such costs to be recovered. As this Court observed many years ago in commenting upon an attempt by the State of Arkansas to impair its contract obligations:

> "We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals." *Woodruff v. Trapnall,* 10 How. 190, 207.

II.

The majority opinion is based upon an erroneous conception of controlling facts.

The facts as found have not been excepted to or contested. The majority opinion states its reliance upon the findings of Commissioner Cowen, which were adopted by all judges of the Court of Claims whether majority or dissenting, as follows:

> "Fortunately, it will not be necessary for us to consider the original evidence, since both parties have agreed to rely upon the Court of Claims' findings, and since we also conclude that those findings are sufficient to dispose of the issues presented" (p. 4).

Nevertheless, with the greatest respect, we must point out that the majority opinion is premised upon basic misconceptions of both the letter and spirit of the findings.

The contrast between the opinion and the findings is perhaps most clearly demonstrated by Appendix A hereto. Some of the more fundamental errors are discussed below.

A.

The Majority Opinion Misconceives the Nature of the "Cost of Money" Information Which Was Secured Through Wenzell, Among Others; and Couples This Misconception With the Statement, Basic to the Opinion, That the Sponsors and the Government Then "Agreed" on the Cost of Money —a Statement Flatly Contradicted by the Findings.

After stating that "the preliminary negotiations with which Wenzell was concerned dealt primarily with the cost of the project, and particularly with the 'all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant,' " the majority opinion continues: "*If the sponsors and the Government had not agreed* on the cost of construction and *on the cost of money*, no contract would have been made, because the cost of power supplied to the AEC was to have been based upon both of those factors" (p. 31).

The findings precisely contradict the foregoing statement. Referring to a meeting of April 10th after Wenzell had left the Government and before the commencement of negotiations between the AEC and respondent, the findings say:

> "During the meeting, Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be 3½ percent, but he further stated that if it developed that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols [General Manager of the AEC], took the position that if the actual cost

of money to the sponsors was less than $3\frac{1}{2}$ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate.

"The cost of money, to which both Dixon and Nichols referred, is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market. As will hereinafter appear, the actual cost of the money borrowed was $3\frac{5}{8}$ percent for MVG's bonds and $3\frac{1}{4}$ percent for its notes" (F. 102, R. 103-04; see also F. 114, R. 112).*

As the court below accurately stated, the "cost of money" information was such that "A few well placed telephone calls by any responsible person would probably have obtained such information" (R. 42-43).

We concede that the cost of money—the *actual* cost, not *estimated* cost—is of paramount importance with respect to an enterprise such as a power plant, in which capital costs represent so large a portion of the consumer's bill.

Actual money costs are not determined, however, until bonds are sold or a contract for their sale is made. The interest cost is then determined, not by any prior estimate, but by the forces of a competitive market place where money is the thing dealt in.

Nevertheless, before negotiations of the power contract could be initiated, the parties had to postulate an interest rate on the debt portion of the financing so that various formulas could be worked out. It was also necessary that each of the parties know what figure was to be used for this purpose. Such figure was to be used tentatively by

---

* The overall interest cost for respondent's debt securities would have been 3.58% under its contract with the insurance companies and bankers (F. 114, R. 112).

both sides, however, with the express understanding that when and if the necessary debt financing was agreed upon with lenders, the actual interest rate payable thereon, not the estimated rate, would be determinative of any contract provisions based on the interest cost (F. 102, R. 103-04). It is true that both parties sought to obtain from Wenzell an estimate of the interest rate for this purpose.* It is also true, however, that both parties wanted to have the estimated rate as realistic as possible.

Suppose that Hughes, instead of calling in Wenzell, had had some prior acquaintance with Dixon and had said to him: "You have connections in the financial community. Why don't you find out what a good, realistic estimate would be, based upon present market conditions, of the probable interest cost of the debt portion of an OVEC-type capitalization for this enterprise? We can then both use that figure as the estimated interest rate in considering formulas for such a contract, with the understanding, of course, that it will be the actual interest rate finally granted by the lenders, not the estimated rate, which must be determinative of the related provisions of any contract. In other words, until the actual interest rate has been determined with the lenders, neither party will be bound."

In such case would the contract be thrown out for conflict of interest? Would Dixon be deemed to be "negotiating" on behalf of the Government? Surely not. Such situations, in which one party to a transaction relies upon another to secure for both objective, factual information, are commonplaces of the market. No one questions them in the slightest in the conduct of day-to-day business.

* The majority opinion fails to note that estimates were also sought from other investment bankers and officers of institutional investors (other than First Boston) (Fs. 62, 101; R. 79, 103).

In the case just given Dixon would have a direct, immediate and easily observable "conflict" with the Government so far as the overall transaction is concerned. Yet it is quite apparent that the "conflict" would not touch the area of the activity he engaged in at the request of Hughes; it would not touch the securing for both sides of objective, factual information in which both sides had a common interest and the effect of which, in any event, would be binding upon neither side but would be subject to adjustment by subsequent mutual agreement in the light of the actual interest rates granted by the lenders.

And if what Dixon was assumed to do in the case just given would not void the contract, how can it be said that having the same thing done by Wenzell, whose interest is indirect and remote even under the reasoning of the majority opinion, results in a void or voidable bargain? The contract should be upheld *a fortiori*.

The indisputable fact is that, until the contract was signed on November 11, 1954, the sponsors and the Government never did agree "on the cost of money," as the majority opinion states. The erroneous impression evidenced in the majority opinion regarding the nature of the "cost of money" estimates, together with the basic but erroneous premise that the parties, by tentatively using those estimates, thereby "agreed * * * on the cost of money," is alone sufficient to require a reconsideration of this case in the interest of simple justice.

B.

Wenzell Was Not "the Real Architect of the Final Contract."

The majority opinion (p. 30) says: "We do not think it would be erroneous to characterize him [Wenzell] as the real architect of the final contract."

Such characterization is erroneous; it is not supported by the findings. The characterization was advanced for the first time in the majority opinion of this Court and goes beyond the charges made by the advocates for the Government. Certainly no such charge was made by any of the Government lawyers who tried the case, who heard and saw Wenzell testify, who themselves put questions to him, and who had every incentive to make such a charge if it were justified by the facts. It is contrary to the findings of Commissioner Cowen and the opinions in the court below; it finds no support even in the dissents.

The detailed undisputed findings were fairly summarized in the opinion of the majority below:

> "Wenzell had substantially nothing to do with the substance of the contract" (R. 13).

That Wenzell was not the architect of the contract in any sense is shown beyond peradventure by the following specific findings:

> "There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared" (F. 95, R. 100).
>
> "The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith and Seal. Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted" (F. 104, R. 105).*
>
> "Wenzell did not participate in any of the negotiating sessions [July 7 to November 11, 1954, with the AEC], and there is no evidence that he consulted

---

* This also shows the plain error of the majority opinion's reference (p. 32) to "the second proposal, upon which Wenzell had expended so much time and energy * * *."

with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).

Finally, the unimportance of Wenzell is perhaps best shown by the following testimony of General Kenneth D. Nichols, General Manager of the AEC, regarding the very meeting with Wenzell which the majority opinion (p. 17) seems to have considered significant:

"Q. All right, now, directing your attention to Saturday, April 3, 1954. Do you recall any contact that you had on this matter on that day? A. Checking on various records that exist, I undoubtedly met on that date with Mr. Wenzell, on a Saturday morning. However, I do not recall Mr. Wenzell as an individual, but there is no reason for me to doubt the record, that I did meet with some one as a result of a call from Mr. Hughes.

"Mr. Cook has written up this record.

"And, certainly I recall that there was such a meeting, although being four years ago and actually I have a shorter recollection of it than that, that I had no recollection up until recently that I had ever met with Mr. Wenzell.

"In fact I apparently had him confused with someone else" (Tr. 1492-93).

The Court's opinion with respect to the importance of Wenzell creates a grievously erroneous premise which underlies the entire decision and which requires reexamination.

C.

The Court Misconceives the Difference Between the April 10th Proposal (Which Was Not a Negotiated Document But a Proposal By the Sponsors) and the Power Contract (Which Was the Product of 4½ Months of Most Strenuous Negotiations in Which Wenzell Had No Part Whatever).

The majority opinion demonstrates a misunderstanding or a failure fully to recognize the difference between the April 10th proposal and the contract, and its reliance upon such misconception, in a number of places. It says, for example, that the contract in a general way was within the terms of the proposal (p. 32) without pointing out, as the Court of Claims does, the important differences; it suggests that the negotiations may have been merely "perfunctory" (p. 33), whereas the findings in this case show beyond doubt that they were at the opposite end of the pole from that adjective; it speaks of Wenzell as acceding to the demands of the sponsors (p. 35), and favoring the sponsors (p. 35), with nothing in the record or findings to support such conclusions; and it states many similar misconceptions on pages 29 and 30, winding up with the characterization of Wenzell as "the real architect of the final contract."

We had thought that the findings alone established the difference between the April 10th proposal and the contract, the minor role played by Wenzell with reference to the April 10th proposal, and the lack of any connection between Wenzell and the contract. In that belief we did not deem it necessary to burden the Court with the text of the documents themselves.

In view, however, of the plain and demonstrable misconceptions underlying the majority opinion of the Court in this regard, we now think we are entitled to ask this Court to look at the documents themselves in order to dispel these misconceptions and correct the error to which they

have led. Accordingly, we are filing herewith as Exhibits to this petition a copy of the April 10th proposal (Def. Ex. 28), and a copy of the Power Contract (Pl. Ex. 1) in the form in which it was admitted in evidence in the court below.*

The quotations from Findings 95 and 104 set forth *supra*, page 30, show clearly that Wenzell had nothing to do with either the preparation of the basic cost estimates for the second proposal or the drafting of that proposal. The fact is that the only part of the proposal Wenzell functioned on at all is the first sentence of the penultimate paragraph before the signature—the sentence regarding the belief of the responsible financial specialists that the financing could be arranged under then existing market conditions in such a way as to make a contract based upon the proposal a feasible transaction.

But in addition to Wenzell's minor role with reference to the proposal, we believe that on examination of the contract itself it will be apparent that this is far from a situation in which somebody on behalf of the Government merely looked at the proposal, said "yes," and made a contract. And the findings are quite clear as to this. We quote from the record, pages 120-22:

> "133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.
>
> "The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

* Prior to termination, the Power Contract, together with the Interpretative Memorandum, certain related legal opinions and other documents, were printed in booklet form for use in carrying on operations under the contract. The entire booklet was offered and admitted in evidence.

"The sponsors' team was headed by James and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

"From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 19,* 1954, the Government insisted on two new contract provisions, and it was doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract.

"134. On August 18 Nichols and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

---

* This is a typographical error. The proper date is November 10.

"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

"Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. At the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as 'major concessions from the Company' which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

"135. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times,

Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

"136. Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation."

The various statements in the majority opinion regarding the negotiations by Wenzell, his acceding to demands of the sponsors, his participating as an architect of the contract and the like, are not supported by the findings. More important, they are not supported by the record—and that in a record in which the Government had every advantage of proving a case—if a case had existed. Every living person connected with the Government who at any time had anything to do with this matter was available to the Government counsel, and none of those witnesses showed any reluctance. The lack of support for the statements in the majority opinion is therefore doubly significant.

We submit, therefore, that the misconceptions in the majority opinion regarding the difference between the April 10th proposal and the contract, including the lack of any significant function by Wenzell regarding the proposal and of any function at all regarding the contract, and the patent effect on that opinion of such misconceptions, are also, by themselves, sufficient grounds to require reconsideration of this case by this Court.

Conclusion.

Respondent's petition for rehearing should be granted, and upon rehearing, the judgment of the Court of Claims should be affirmed.

Dated: March 3, 1961.

Respectfully submitted,

JOHN T. CAHILL,
80 Pine Street,
New York 5, New York,
Attorney for Respondent.

WILLIAM C. CHANLER,
40 Wall Street,
New York 5, New York,
Of Counsel.

Certificate.

The undersigned, counsel for respondent in the foregoing petition for rehearing, hereby certifies that the foregoing petition is presented in good faith and not for delay.

JOHN T. CAHILL.

Appendix A.

Comparison of Statements in Majority Opinion with Facts as Found.*

Opinion	Findings
"Although the findings of fact do not specifically indicate wherein the second proposal differed from the first * * *" (p. 9).	"However, the second proposal differed from the first in several respects. "In the first proposal, the capital cost figures were based on a study which had originally been made for the Mississippi Power & Light Company in connection with an offer it made to TVA. Since that offer related to a plant having 450,000 kw. capacity, the cost figures in the February 25 proposal were adjusted upward to provide for a plant of 600,000 kw. On the other hand, the capital cost figures in the April 10 proposal were based upon estimates prepared by Ebasco for the actual cost of constructing a plant of the desired capacity at West Memphis, Arkansas. "The proposal of February 25 referred to and compared the sponsors' capital cost with TVA's estimated

* Both parties and the Court rely on the findings of fact as stated by the Court of Claims. See Opinion, p. 4.

Opinion	Findings
	costs for the construction of the proposed plant at Fulton, Tennessee, [fol. 402] whereas the April 10 proposal did not mention a comparison of costs with the TVA Fulton plant.
	"In the first proposal, the base capacity charge was stated as $9,626,000, whereas the base capacity charge in the second proposal was $8,775,000.
	"The proposal of February 25 stated that the energy charge and other terms and conditions of the contract, including adjustments, were to be similar to those contained in AEC's contract with TVA for such service, but in the April 10 proposal, the energy charge was stated in specific figures and the terms for the adjustment thereof were set out in some detail" (F. 103, R. 104-05).
"On June 16, 1954, the President authorized AEC to *continue* negotiations with the sponsors * * *" (p. 9).	"On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, *directing AEC to proceed with negotiations* with the sponsors * * *." (F. 130, R. 119). The letter to the sponsors from the AEC said: "We are ready to *begin* negotiations" (F. 131.

Opinion | **Findings**

R. 120). "The sponsors' proposal was a firm offer but, as indicated by the quotation above, the AEC letter *was not an acceptance;* it was simply a statement that AEC was ready to *begin contract negotiations.*

"* * * Shortly after June 30, AEC was advised that the sponsors had prepared a draft of the proposed contract and were *ready to begin the negotiations.* In order to have the draft printed and allow the AEC an opportunity to consider it, it was agreed that the *negotiations would begin on July 7, 1954*" (Fs. 131, 132, R. 120).

"He [Wenzell] owned stock in First Boston, although the stock was in his wife's name" (p. 11).

This was 200 shares (F. 125, R. 117) which was 44/1000ths of 1% of the outstanding capital stock of First Boston (*Moody's Banks, Insurance, Real Estate and Investment Trusts* [1954], p. 1141).

"After Wenzell *thought he had found* the answer to Dixon's question [as to probable interest rate on debt portion of an OVEC-type capitalization], he called

Wenzell's first answer was the only answer Dixon asked for and the only answer Wenzell ever gave—the estimate that 3½% was a probable interest rate based on

Opinion

Dixon and advised him of the information he had acquired from his colleagues at First Boston. During the week that followed, *Wenzell made* further studies and *engrafted certain refinements* onto his calculations. Then, on February 14, 1954, he attended a meeting in Dixon's office and gave Dixon the *new figures* which he had computed" (p. 15).

Findings

then market conditions. This answer he never changed. The implication that Wenzell made further studies at the request of Dixon must be compared with F. 59, R. 77-78, which is as follows:

"Hughes requested that further studies be made on other forms of capitalization and on different periods for repayment of the debt." So far as the sponsors are concerned Wenzell never "engrafted certain refinements on his calculations." He never made any calculations for the sponsors. He got only an estimate of what the interest rate might be. The statement that he gave Dixon "new figures" must be compared with the finding that "Wenzell gave them the information on interest rates that he had previously obtained from First Boston". (F. 61, R. 79).

"Dixon arranged a meeting with Yates on February 19, and *he* requested Wenzell, who had known Yates for several years, to be present" (p. 15).

"In a telephone conversation prior to the meeting, *Hughes* requested Wenzell to attend as representative of the Budget Bureau." (F. 64, R. 80).

Opinion	Findings
"The information in this letter conformed to the oral opinion which Wenzell had rendered on February 14, 1954. The letter was on First Boston stationery and was signed by Wenzell as an officer of First Boston" (p. 15).	This was not a letter but a mere draft; it was not on First Boston stationery but the draft merely indicated that if and when it should be written, it was intended to be written on First Boston stationery; and it was an unsigned draft bearing no signature of Wenzell or of anyone else on behalf of First Boston (F. 67, R. 82-83, Def. Ex. 22).
"The 'responsible financial specialists' upon which the sponsors relied were Wenzell and his colleagues at First Boston, and the *cost data* upon which they conditioned their proposal was that which was contained in the opinion letter drafted by Wenzell" (p. 16).	It is not accurate to speak of First Boston's estimate of 3½% as the probable interest rate as "cost data". Unlike the elaborate construction and other cost data which were prepared by Ebasco, Southern Services and other persons representing the sponsors, the interest estimate was not considered binding on anybody. See comment on Opinion, p. 31, *infra*. There is also no reference to the fact that the 3½% had been verified by the sponsors not only from First Boston but also from "several investment bankers and officers of institutional investors (other than First Boston)" (F. 62, R. 79).

Opinion	Findings
Referring to discussions on March 1, 1954, the Opinion says: "Hughes was advised that, despite *Wenzell's insight into the problem,* there still remained areas of uncertainty" (p. 16).	There is no support in either the record or the findings for "Wenzell's insight into the problem." It is contrary to F. 74, R. 89, where he stated that he was not qualified to answer power engineering questions and F. 85, R. 95, where he said he was not qualified "on the matter of overall costs."
"Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made" (p. 16).	Hughes reached an agreement with Nichols and Clapp on March 3, that the AEC and TVA would make a joint analysis of the proposal (F. 80, R. 92-93). Wenzell's meeting with Seal took place the day before, on March 2 (F. 75, R. 90).
"Wenzell saw the letter and made several changes on it *for the sponsors* in his own handwriting" (p. 17).	There is nothing to support the statement that Wenzell made changes for the sponsors, or that he was ever in communication with them regarding this draft letter (F. 90, R. 98).
"*While* Adams was preparing his analysis, the sponsors were working on some revised estimates" (p. 17).	"*After* Adams had made an *independent* analysis of the February 25 proposal on the basis of the material furnished him, Adams, McCandless, and other staff members of the Bureau met with Seal on March 24, 1954, at which time Adams stated

Opinion	Findings
	that the figures in the proposal were considerably higher than a reasonable estimate of costs to the sponsors. Adams *then* asked Seal to develop basic estimates for the cost of constructing a plant and other facilities to provide the services contemplated in the proposal, and Seal agreed to confer with the sponsors regarding this request" (F. 93, R. 99).
"At the conclusion of the meeting, it was decided that the sponsors should undertake to prepare a new proposal in line with their revised estimates" (p. 17).	"*As a result of Adams' analysis,* it was agreed that the revised cost estimates were better than those contained in the proposal of February 25 but that further refinement of the figures was required. Dixon and Yates were told that if they could submit a new firm proposal close to the revised cost estimate, the Budget Bureau would feel that the new proposal would deserve serious consideration" (F. 97, R. 100).
On page 17 reference is made to the fact that on April 3 Nichols "suggested that Wenzell encourage the sponsors to refine their figures." On page 29, the Opinion says that Wenzell	There is no evidence or finding that Wenzell ever carried out Nichol's suggestion. There is no reference in the majority opinion to the fact which made it most unlikely that he ever did so—that on

Opinion	Findings
"urged the sponsors to refine their figures after the initial proposal was rejected * * *."	the morning of that very day Dixon and Yates had been told by Hughes, McCandless and Adams in the presence of Wenzell "that further refinement of the figures was required" (F. 97, R. 100).
"The second proposal, like the first, contained a paragraph indicating that the sponsors relied upon Wenzell's advice and conditioned their offer on that advice" (p. 18).	Wenzell's advice should be limited to probable interest costs alone.
"* * * Hughes was aware of most of Wenzell's activities, * * *" (p. 18, ftn. 8).	Wenzell's activities were carried out pursuant to Hughes' directions or instructions (F. 46, R. 71; F. 55, R. 76; F. 59, R. 78; F. 64, R. 80; F. 67, R. 84; and F. 69, R. 85).
"* * * he [Wenzell] had given the sponsors an opinion letter on the probable cost of money * * *" (p. 19).	He had not given an opinion letter; he had prepared a draft, which had not even been cleared with his superior, Linsley (F. 107, R. 107).
"When *in early March 1954*, James learned that Wenzell had not yet resigned, he asked Hughes why Wenzell had been permitted to continue as a consultant to the Bureau" (p. 21).	"*Sometime later in March* 1954, when Dixon and James called on Hughes in Washington on another matter relating to the project, James raised the question of Wenzell's duality with Hughes" (F. 78, R. 92).

Opinion	Findings
Pages 29 and 30 of the Opinion summarize all the foregoing—as well as many vital omissions not mentioned in the foregoing parallel columns—by referring to Wenzell as "the Government's key representative in the crucial preliminary negotiations"; as frequently "the only representative of the Government at important meetings"; as the supplier to the sponsors of "vital information"; as "an advisor on the total cost of the project" with no mention of the findings that he was unable to advise in this area (F. 74, R. 89, F. 85, R. 95); as "the Government's major representative in the formative negotiations of this multi-million dollar contract"; and finally as "the real architect of the final contract."	None of this has any support in the record or findings. See Point II, B and C, of Petition for Rehearing.
"If the sponsors and the Government had not *agreed* on the cost of construction and *on the cost of money*, no contract would have been made * * *" (p. 31).	"During the meeting [on April 10], Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be $3\frac{1}{2}$ percent, but he further stated that if it developed

Opinion	Findings
	that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols took the position that if the actual cost of money to the sponsors was less than 3½ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate" (F. 102, R. 103-04). "A few well placed telephone calls by any responsible person would probably have obtained such information [as to probable interest rates in the money market]" (Opinion below, R. 12-13).
"The second proposal, upon which Wenzell had expended so much time and energy * * *" (p. 32).	"Following Adams' suggestion to Seal, a group of executives from Middle South and Southern, together with engineers from Ebasco and Southern, worked from March 26 to about April 1, 1954, on the preparation of detailed cost estimates covering the construction of a power plant at West Memphis, Arkansas. These cost estimates were used as a basis for the sponsors' pro-

Opinion	Findings
	posal of April 10, 1954. *There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared*" (F. 95, R. 100).
	"The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal. *Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted*" (F. 104, R. 105).
"Although the final contract was slightly different from the second proposal * * *" (p. 9). Also: "* * * the Court of Claims specifically found that '[i]n a general way, the contract was within the terms of the proposal' " (p. 32).	"In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

Opinion	Findings
	"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages" (F. 134, R. 121).
"* * * and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often *perfunctory* stage of the proceedings" (p. 33).	"The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.
	"The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. *They were a competent and aggressive* staff of negotiators.
	"The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8

Opinion | Findings

persons with a total of 11 people taking part.

"From July 7 through September 17, *there were 15 formal sessions* for which minutes were kept. In addition, there were informal sessions for which no minutes were made. *Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators.* The negotiating sessions were *lengthy, arduous, and hotly contested.* As late as November 19, 1954, the Government insisted on two new contract provisions, and *it was doubtful whether there would be a contract* unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract" (F. 133, R. 120-21).

"Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he con-

Opinion	Findings
	sulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).
"* * * he [Wenzell] was, to say the least, subconsciously tempted to ingratiate himself with the sponsors and to accede to their demands * * *" (p. 35).	There are no findings that the sponsors made any demands upon Wenzell or upon any other representative or agency of the United States.
"That Wenzell, on at least two occasions, brought *senior* officers from First Boston with him to *negotiating* sessions * * *" (p. 36, ftn. 16).	Miller was an assistant in the buying department (F. 49, R. 72), and Robinson was assistant vice president (F. 74, R. 89). Moreover, Robinson was brought only to a staff meeting, with no representative of the sponsors present, which could not possibly be a "negotiating" session.
"There is nothing in the findings to show whether the contract here involved was favorable or unfavorable to the Government" (p. 43, ftn. 20).	The opinion of the Court of Claims says: "The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skillful bargaining by representatives of the Government who had complete fidelity to their trust, and which became use-

less to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power" (R. 17).

The concession referred to by the court in the foregoing quotation was a concession made by counsel for the Government, in open court, that there was in fact no corruption, fraud, dishonesty or loss to the Government in this case.

[illegible]

Supreme Court of the United States

[illegible]

No. 26

THE UNITED STATES

[illegible]

MISSISSIPPI VALLEY GENERATING COMPANY

[illegible]

Respondent.

[illegible]

EXHIBITS TO RESPONDENT'S PETITION FOR REHEARING.

[illegible]

New York 5, N.Y.

[illegible]

William C. [illegible]

[illegible]

D. EX. 28

April 10, 1954

ATOMIC ENERGY COMMISSION
Washington, D. C.

Attention: General K. D. Nichols
General Manager

Dear Sirs:

In response to the suggestion in the President's Budget Message that the power industry might furnish 500,000 to 600,000 kilowatts to your Commission by the Fall of 1957, Middle South Utilities, Inc. and The Southern Company submitted a proposal to you under date of February 25, 1954. It was our understanding of the Budget Message that this power was desired in order to reduce the commitments of Tennessee Valley Authority to your Commission for service at Paducah, with a resultant reduction in the amount of capital expenditures which would have to be budgeted for TVA. Our proposal was designed to accomplish that purpose.

As you know, our February 25th proposal was formulated upon short notice and on the basis of data which was not as complete as is desirable in connection with such a matter. Since February 25th, we have acquired additional information and have had time for further study. As a result, we are pleased to be able to make an offer to your Commission on a more favorable basis. Accordingly, we hereby withdraw our letter of February 25, 1954, and submit to you the proposal set forth in this letter and the accompanying Appendix.

Our proposal provides for rates, exclusive of taxes, having a base annual demand charge of \$14.62½ per kilowatt-year, subject to variation up or down in case of increase or decrease in actual cost of construction as compared with the present estimate, with a maximum increase of 47½¢ per kilowatt-year. The base energy charge is 1.863 mills per kilowatt-hour, which is estimated cost, subject to variation up or down in case of increase or decrease in fuel costs and wage rates.

In considering our proposal for purposes of comparison, it is important to bear in mind that there are two classes of factors to be weighed. One class includes those where a Government agency enjoys advantages not available to private industry and with which private industry cannot hope to compete—Government credit, freedom from taxation, certain subsidies, etc. The other class of factors has to do with performance. As to the latter, private industry can perform at least as well as Government and is willing to face any fair comparison. In the present proposal, an attempt has been made, insofar as possible, to separate these two classes of factors so that a fair comparison may be made.

It is, of course, impossible to know now, on the basis of presently estimated cost, what the actual ultimate cost of a new plant will be. The effect of our proposal, however, is to provide that if the actual construction cost is less than anticipated the Government is to participate equally with us in the benefits from such reduction. Its effect also is to provide that if the construction cost exceeds the estimate, the resulting increased costs are to be divided equally between us and the Government, except that there is a guaranteed maximum above which the Government does not bear any such additional costs and we bear them all. Thus the Government is provided with a ceiling—we with an incentive to benefit the Government as well as ourselves.

Under our proposal, a new corporation to be formed by us will make the expenditure to build the plant, and the taxpayers will make only annual payments related to the annual cost of supplying the power for the 25-year period of the contract. Moreover, if the Government's need for this power should for any reason come to an end, the Government may terminate its contractual obligation on a reasonable basis and thereby relieve the taxpayers of any further payments on account of power their Government no longer needs or uses.

Every consideration has been given to the fact that a 25-year contract with the United States Government, acting through your Commission, will tend to lower the cost of money to the new corporation. Full allowance has been made for the lesser risk of a government contract as compared with risks in normal situations involving relatively short-term contracts with ordinary businesses. As is indicated in the Appendix, we have also given full consideration to the fact that the power involved will be utilized by the Government itself for a purpose related in the main to defense. Naturally, under such special circum-

stances, we are able to finance with a substantially larger proportion of long-term debt than would be permitted by regulatory authorities in a normal public utility situation. Moreover, we are willing and able to go further in this special defense situation than we otherwise would.

As stated above, our proposal has been formulated with the end in view of supplying power and energy to your Commission, an agency related in the main to national defense, for use in pursuance of your statutory purposes. At the same time, however, we have attempted by our proposal to assist the Government in the solution of a broader overall problem. TVA testimony before Congressional Committees indicates that the power released by your Commission upon acceptance of our proposal will be of use to TVA in West Tennessee, and particularly in the Memphis area. It will therefore be both practical and economical if deliveries by our new generating company are made to you or for your account over interconnections with TVA in the Memphis area, and if TVA, in turn, delivers a like amount of power to your Paducah facilities from its Shawnee Station. To do this, the facilities of the new company will be located near Memphis. This plant site will have the following advantages: (a) it will locate the plant where fuel can be readily obtained via the Mississippi River or by rail; (b) it will locate the plant where interconnections can be readily made with major power systems; (c) it will make it unnecessary for TVA to build transmission lines back from Shawnee to the Memphis area, thus avoiding assessment of further amounts against taxpayers for this purpose; and (d) the additional capacity will not be built in the Paducah area which, if the AEC demand were cancelled, would be oversupplied with power.

Both the Middle South System and the Southern Company System have regularly delivered substantial blocks of power to TVA over existing interconnections. If interim power is desired, the undersigned are prepared to negotiate a separate definitive agreement for such purpose.

We have received assurances from responsible financial specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon the arranging of such financing. Our proposal is also subject to our securing appropriate Treasury Department rulings or agreements with respect to the sinking fund depreciation upon which the computations underlying our proposal are predicated.

The attached Appendix sets forth an outline of additional matters in our proposal, including the more important provisions which will be embodied in a contract growing out of it. We are ready to negotiate a definitive contract at your early convenience.

Very truly yours,

Middle South Utilities, Inc.

By E. H. Dixon
President

The Southern Company

By J. M. Barry
Chairman of the Executive Committee

APPENDIX

Price

CAPACITY CHARGE —A Base Capacity Charge of $8,775,000 annually, payable 1/12 monthly for Contract Capacity of 600,000 Kw, subject to adjustment as follows:

(a) For cost of Seller's Initial Facilities: plus or minus 50% of an amount computed at the rate of $58,550 annually for each $1,000,000 by which the sum of (i) the cost of Seller's Initial Facilities and (ii) $1,135,000, the estimated cost of transmission additions required in the Middle South System in connection with the proposed transactions is greater or less than $107,250,000; provided however, additions to Base Capacity Charge shall not exceed $285,000.

(b) For No-Load Fuel: plus or minus an amount computed at the rate of $3500 per month for each 1¢ by which the cost of coal delivered (unloaded) at Seller's plant is greater or less than 19¢ per million Btu.

(c) For Power Factor of less than 93%: the monthly payment for capacity shall be increased in the ratio of the maximum Kva at the Primary Delivery Points during any 30 consecutive minute interval, to 645,000 Kva.

ENERGY CHARGE —1.863 mills per Kwh delivered at Primary and Secondary Delivery Points, subject to adjustment as follows:

(a) For cost of Coal: plus or minus an amount computed at the rate of 1/11 mill per Kwh for each one cent increase or decrease above or below 19¢ per million Btu in the cost of coal (including any taxes and other imposts assessed against the coal, its extraction, sale, transportation, use or otherwise) delivered (unloaded) at the Com-

pany's generating station near West Memphis, Arkansas.

(b) For cost of labor and other operating and maintenance expenses for each six month period beginning with January or July: plus or minus an amount computed at the rate of 1/100 mill per Kwh for each 4¢ increase or decrease above or below $1.97 in the six-month average of Hourly Earnings of Production Workers in Gas and Electric Utility Industries, as compiled by Bureau of Labor Statistics for the preceding six-month period ending with March or September. Such adjustment shall be made as though not less than 1/12th of 4,000,000,000 Kwh were delivered each month, whether or not actually delivered.

OTHER CONDITIONS—(1) This offer is subject to approval of regulatory bodies having jurisdiction and to force majeure. In the event of new laws, orders or regulations or changes in existing applicable laws, orders or regulations adversely affecting wage rates, hours of work or other conditions, or active hostilities, any of which shall result in increased costs hereunder, the effect of such changes shall be incorporated in any contract resulting from this offer to the end that the rights of the Seller shall not be impaired by such changes, and the parties will enter into appropriate amendments of such contract to that end.

(2) In consideration of the fact that Seller's production, delivery and other Initial Facilities are to be installed primarily for the purpose of making deliveries to or for the account of the Buyer, and that the base prices and adjustments for the service to be provided hereunder do not include any taxes except those referred to below in clause (a), it is understood that the Buyer will pay such additional amounts for capacity and

energy as will result, after the payment by Seller of Federal, State and local taxes, licenses, fees and other charges in the Seller having Net Operating Revenue (as such term is defined or derived under the presently applicable Federal Power Commission Uniform System of Accounts) in the same amount as Seller would have had if Seller were not liable for any taxes, licenses, fees and other charges; provided, however that:

(a) Inasmuch as the taxes hereinafter referred to are included in other reimbursable costs or charges, Buyer shall not be required to pay to Seller any additional amounts on account of taxes at current rates in the category commonly called Social Security taxes (such as State Unemployment, Federal Unemployment, Federal Old Age Benefit, or similar taxes) currently applicable to payrolls; nor shall Buyer be required to pay to Seller any additional amounts on account of sales and use taxes on operating supplies, taxes and other imposts assessed against the coal, its extraction, sale, transportation, use or otherwise, at currently applicable rates, including Federal, State and local taxes on gasoline, tires, oils, stationery, etc. and

(b) All the Seller's Initial Facilities are to be first devoted to service to Buyer, up to the Contract Capacity, but Seller may make use of Initial Facilities for purposes other than the supply of capacity and energy to or for Buyer at such times and to such extent as such service to Buyer does not prevent such other use; and to the extent that the

Initial Facilities are so used for such other purposes and Seller derives income therefrom and incurs tax liabilities as a result thereof, such tax liabilities shall be discharged at the sole cost and expense of Seller. Seller will maintain records of the revenue derived from such other use, and the incremental cost of generating such energy, so that the tax liabilities arising out of such other use may be determined and excluded from bills payable by Buyer.

(3) Buyer will take service on not less than Minimum Schedule and shall not be entitled to service at any rate greater than Contract Capacity.

(4) The Base Capacity Charge includes the costs associated with Initial Facilities of approximately 650,000 Kw, of which capacity in excess of 600,000 Kw is reserve capacity, and the Base Capacity Charge includes the costs associated with such excess as compensation to Seller for furnishing reserve capacity sufficient to provide firm service with one unit out of service. In recognition of the fact that such reserve capacity is not adequate to provide the equivalent of one generating unit of the size likely to be installed, Seller will make arrangements with others, including the companies making this proposal, to furnish, without additional charge to Buyer, additional supplies of power and energy sufficient, with one generating unit out of service to deliver 600,000 Kw at the Primary and Secondary Delivery Points.

(5) This offer is premised on the fact that the equivalent of the power and energy involved will be utilized by the AEC, an agency related in the

main to national defense, in pursuance of its statutory purposes. In this special situation, Seller is willing and able to go further than it otherwise would or could. Accordingly, it is understood that TVA will accept such power and energy for delivery to Buyer by transmission or displacement, and that all such power and energy is for Buyer's utilization, and not for resale except as otherwise specifically provided.

(6) The term of the contract will be 25 years.

(7) Termination:

(a) After commencement of full scale operation, termination will be allowed on 3 years' notice, during which period assignment may be made to another Governmental Agency, at contract rates, including all taxes and other adjustments.

(b) Upon termination Seller shall be entitled to and will absorb capacity at least as rapidly as load growth will permit, but in any event in the amount of at least 100,000 Kw in each year, absorbing associated proportions of costs. Buyer may assign any balance to another Governmental agency at an increased price to be approved by FPC, such price to include recognition of any increased costs then encountered or foreseen by Seller. To extent such capacity is not used by Buyer or Assignee, Buyer will reimburse Seller for pro rata proportion of Base Capacity Charge, as adjusted, and taxes.

(c) In event of partial termination above formula will be applied on a pro rata basis.

(d) In event Buyer relinquishes right to Capacity after termination, Base Capacity Charge (including adjustments) will be thereafter reduced $1,500,000 proportionally in case of partial reductions.

(e) Buyer will repay Seller for any fair and reasonable cancellation charges payable by Seller to a third party and costs, losses and other expenses incurred by Seller by reason of cancellation.

(8) Seller will use its best efforts to have the first unit of the generating station in operation 36 months after the contract is entered into, and to have subsequent units in operation at reasonable intervals thereafter.

(9) Seller will receive cooperation from Buyer for any necessary priority assistance.

(10) Buyer will arrange with TVA for receipt and displacement of power and energy.

(11) There will be a pro rata determination of capacity charge during interim between completion of the first generating unit and the final generating unit.

(12) Miscellaneous—The contract will also contain, among other things, provisions, similar in principle to those hereinafter referred to contained in the Buyer's Power Agreement with Ohio Valley Electric Corporation dated October 15, 1952, relating to transfers of energy for use at other government installations (Sec. 2.05, paragraphs 2, 3 and 4 and Sec. 7.12), extensions of contract term for two additional periods of five years each (Sec. 3.09), review of Seller's plans and procedure (Sec. 3.10), purchase of fuel (Sec. 7.02), review and audit of Seller's accounts (Sec. 7.04), all in such form as may be mutually agreed upon.

ONS

—New Company to be formed by Middle South Utilities, Inc. and The Southern Company.

—Atomic Energy Commission.

—Tennessee Valley Authority.

—New points of delivery to be established, by agreement among Buyer, Seller and TVA, at the middle of the Mississippi River between Shelby County, Tennessee, and Crittenden County, Arkansas.

—Existing and future points of connection between systems of Seller, Arkansas Power & Light Company, Mississippi Power & Light Company, subsidiaries of The Southern Company and TVA, it being understood that the flow of power and energy cannot always be confined to Primary Delivery Points.

—A new steam electric generating station to be constructed by Seller, of approximately 650,000 Kws capacity (approximately 50,000 in excess of Contract Capacity, for reserve), together with all other lines, property, equipment and other assets and debits of Seller, including $2,000,000 of net current assets as working capital, acquired for the purpose of or incident to making or carrying out of this proposal. Additional facilities that may be constructed subsequent to completion of Initial Facilities shall have no effect on this proposal or any resulting agreement.

—600,000 kilowatts.

Minimum Schedule —Not less than 35% of Contract Capacity, which is the minimum capacity and energy which can be economically produced by Seller's production facilities, not less than which will be scheduled for delivery at all times except upon reasonable notice of reduced requirements, and for resumption of minimum or greater requirements.

April 10, 1954

TABLE OF DOCUMENTS.

1. Power Contract No. AT-(40-1)-1814, dated November 11, 1954, as modified by Supplement No. 1 dated November 11, 1954, which supplement
   (a) added Sections 4.15 and 7.09, and
   (b) revised Sections 7.08 and 8.23.
2. Interpretative Memorandum re Power Contract, with covering letter dated November 11, 1954.
3. Letter agreement dated November 11, 1954 with reference to the execution and delivery of the Power Contract.
4. Explanatory letter dated November 11, 1954 re Item 3.
5. Letter Contract No. AT-(40-1)-815 dated November 11, 1954 with Middle South Utilities, Inc. and The Southern Company.
6. Letter dated November 11, 1954 from Middle South Utilities, Inc. and The Southern Company as to access to load data.
7. Letter from the Atomic Energy Commission, dated November 23, 1954 re interpretation of Section 4.14 of Power Contract.
8. Letter from Mississippi Valley Generating Company, dated November 24, 1954 in answer to Item 7.
9. Resolution adopted November 13, 1954, by the Joint Committee on Atomic Energy.
10. Opinion of the Comptroller General, dated October 5, 1954.
11. Opinion of the Attorney General, dated October 20, 1954.
12. Opinion of the General Counsel of the Atomic Energy Commission, dated November 11, 1954.
13. Opinion of the Comptroller General, dated December 13, 1954.
14. Letter from the Atomic Energy Commission to the Comptroller General, dated December 2, 1954, requesting the opinion included herein as Item 13.
15. Opinion of the General Counsel of the Atomic Energy Commission, dated January 6, 1955.

Whereas, the Proposal contemplates that the Company will construct and own a generating station having a net capability of approximately 650,000 kilowatts and will furnish, even though one unit in the generating station may be out of service, 600,000 kilowatts of power to the AEC, or to the Tennessee Valley Authority (herein called TVA) for account of the AEC in replacement of power furnished by TVA to the AEC; and

Whereas, the Proposal contemplates that, of the approximately 650,000 kilowatts of net capability of the new plant, approximately 50,000 kilowatts will be available toward providing the required reserve to supply service hereunder, and inasmuch as such 50,000 kilowatts is not adequate for such purpose when one generating unit is out of service, the Company is making arrangements with the systems of the Sponsoring Companies so that, in return for the Company's making available to such systems such 50,000 kilowatts of capacity when no units are out of service, such systems will make available to the Company as additional reserve for the Company's obligation to the AEC, at no additional cost to the AEC, up to approximately 200,000 kilowatts of additional back-up capacity when a unit or units of the Facilities are caused to be shut down; and

Whereas, the Proposal was stated by the AEC to constitute a satisfactory basis for negotiation, and this contract has been negotiated pursuant thereto; and

Whereas, the Proposal and this contract are based upon the utilization by the AEC, an agency related in the main to national defense, of power and energy delivered hereunder or its equivalent in pursuance of the statutory purposes of that agency, and the Company has stated that in this special situation the Company is willing and able to assume an undertaking which it could not otherwise assume; and

Whereas, the AEC is making arrangements with TVA whereby TVA will accept deliveries of power and energy hereunder for or on account of the AEC; and

Whereas, in pursuance of the Proposal, the Sponsoring Companies have caused the Company to be organized and have respectively agreed to subscribe to and purchase for cash capital stock of the Company as

follows: Middle South Utilities, Inc., $4,345,000; The Southern Company, $1,155,000; and

WHEREAS, among the considerations which induced the Sponsoring Companies to make the Proposal and to cause the same to be carried out is the reservation to the Company of the right to make use of the Facilities hereinafter described for purposes other than the supply of capacity and energy to or for the AEC at such times and to such extent as such service to or for the AEC does not prevent such other use; and

WHEREAS, arrangements are being made on behalf of the Company with certain institutional investors and banks pursuant to which they will lend funds up to $120,000,000 for that part of the capital required by the Company not represented by the equity participations of the Sponsoring Companies referred to above; and

WHEREAS, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the project;

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

ARTICLE I.

Definitions.

SECTION 1.01. *Facilities:* The Facilities, to be constructed, installed and owned by the Company, will consist of a steam electric generating station of approximately 650,000 kilowatts of net capability, together with all other lines, property and equipment, including general equipment, near West Memphis, Arkansas, all as described in greater detail in Appendix A hereto. The Company in the future shall have the right to build additional facilities, including additions to the Facilities at the same site, provided that any such additions shall not affect this contract except as provided in Section 4.13 or result in an increase in the obligations of the AEC hereunder.

SECTION 1.02. *Primary Delivery Points:* The Primary Delivery Points shall consist of points of delivery over which principal deliveries hereunder are intended to be made, established by agreement among the

AEC, the Company and TVA at the Tennessee-Arkansas state line between Shelby County, Tennessee, and Crittenden County, Arkansas.

SECTION 1.03. *Secondary Delivery Points:* In view of the fact that the flow of energy cannot always be confined to Primary Delivery Points, Secondary Delivery Points (described or referred to in Appendix B) shall consist of other existing and future direct and indirect connections between the systems of the Company and of subsidiaries of the Sponsoring Companies, and TVA.

SECTION 1.04. *Contract Capacity:* Contract Capacity, which shall be applicable after the commencement of commercial operation of the third unit included in the Facilities, shall be 600,000 kilowatts, which is the amount of capacity to be available to the AEC at the Primary Delivery Points and Secondary Delivery Points on the terms and conditions herein set forth, even though one generating unit of the Facilities may be out of service; *provided however,* that if the Facilities when completed and in commercial operation shall have a net capability greater or less than 650,000 kilowatts, then Contract Capacity shall be increased or decreased, as the case may be, by 60/65ths of the difference between such net capability and 650,000, and *provided further,* that Contract Capacity shall be subject to reduction upon termination or cancellation as provided in Sections 7.02, Section 7.03 and paragraph 3 of Section 7.07. For the purpose of this provision net capability shall be determined by mutual agreement as soon as practicable but not later than 18 months after the commencement of commercial operation of the third generating unit, at 5 year intervals thereafter, and at such other times as may be mutually agreed upon: *provided however,* that if during any such interval actual operating experience shall indicate that the net capability as last determined is too high or too low, the parties agree that a new determination shall be made promptly. For the period between the commencement of commercial operation of the first generating unit and the initial determination of net capability, the net capability for the purpose of determining Contract Capacity shall be taken at 650,000 kilowatts. For any period subsequent to a determination of net capability and prior to the next succeeding determination of net capability, net capability shall be as last so determined.

SECTION 1.05. *Capacity Charge:* The Capacity Charge shall consist of the Base Capacity Charge as adjusted, all as hereinafter provided in Sections 4.01, 4.02, 4.03 and 4.10.

SECTION 1.06. *Energy Charge:* The Energy Charge shall consist of the Base Energy Charge as adjusted, all as hereinafter provided in Sections 4.04, 4.05 and 4.06.

SECTION 1.07. *Preliminary Contract Capacity:* See Section 4.07.

SECTION 1.08. *Preliminary Capacity Charge:* See Section 4.07.

SECTION 1.09. *Project:* Project shall mean the Oak Ridge installation, the Paducah installation, or the Portsmouth installation of the AEC or any other AEC installation for which it may become lawful for the AEC to receive electric utility service under this contract.

SECTION 1.10. *Net Capability:* Net capability shall mean the maximum amount of power which can be continuously generated during a reasonable test period, less the amount required in the generating station for auxiliary uses and losses in the step-up transformers to the high voltage bus, under conditions in which all normally operated equipment is in service, equipment is in an average state of maintenance and cleanliness, with the fuel consumed being of the average quality purchased, with normal steam conditions and normal interstage extraction from the turbines, with generators operating with usual coolant pressure and at the voltage required under normal operating conditions and at the power factor for the total net output not less than the power factor calculated as required to deliver the total net output, less losses, at the Primary Delivery Points at 93% power factor, and with circulating water temperature and cleanliness normal for mid-summer.

ARTICLE II

Company to Provide Facilities.

SECTION 2.01. *Construction and Operation of Facilities:* The Company will expeditiously design and construct the Facilities, and will exert its best efforts to have the generating units included in the

Facilities ready for commercial operation on dates determined as follows:

	Months after Effective Date of this Contract
1st Unit	32
2nd Unit	34
3rd Unit	36

The Company agrees to use its best efforts to have the transmission circuits and control equipment included in the Facilities ready for commercial operation as needed in connection with the commercial operation of the foregoing generating units. The Company further agrees that the Facilities when and as completed will be operated and maintained, in accordance with the practices prevailing among prudent operators of similar properties, to provide for the delivery of electric energy to or for the AEC as provided herein.

SECTION 2.02. *Interconnections with Sponsoring Companies:* The Company will establish or cause to be established interconnections between the Facilities and the systems of the Sponsoring Companies, directly or indirectly, by means of which there will be afforded additional security of service under this contract from such systems, and an outlet for power and energy produced at the Facilities and from time to time not needed for deliveries to or for the AEC hereunder. The Company represents that it is entering into a contract or contracts with the Sponsoring Companies or subsidiaries thereof to provide power to the Company over such interconnections for a period of 25 years after the beginning of initial commercial operation for the purposes of (a) enabling the Company to deliver hereunder the full Preliminary Contract Capacity or the full Contract Capacity, as the case may be, even though one generating unit of the Facilities may be out of service, and (b) making available from the Facilities to subsidiaries of the Sponsoring Companies or others power which from time to time is not needed by the Company to furnish the power to which the AEC is entitled hereunder. Energy taken by systems of the Sponsoring Companies will be charged to such systems at not less than the incremental cost thereof.

SECTION 2.03. *Cooperation in Coordination of Systems:* The Company will cooperate with the AEC and TVA in the coordination of design and operation of line terminal positions, circuit breakers, and system relay protection and communication and telemetering and control equipment, including equipment to meet the Company's bias frequency obligations to and from the interconnected power systems, to the extent required to obtain reliable and satisfactory performance of such equipment, to assure reliability of deliveries as scheduled and to minimize disturbances to any of the interconnected systems. The Company will also cooperate in the scheduling of maintenance and overhaul of the Facilities to the end that service under this contract shall be interfered with to the minimum practicable extent. The AEC may designate TVA from time to time as its authorized representative to act for the AEC in various technical aspects of this contract, such as the coordination of design and construction, the scheduling of power, billing verification (including the scheduling and witnessing of meter tests), and coordination of maintenance operations. It is contemplated that any such designations will be worked out after discussions between the AEC, the Company and TVA.

SECTION 2.04. *Priority Assistance:* The AEC will use its best efforts in aiding the Company and the Sponsoring Companies or their subsidiaries to obtain any priorities which may be necessary for the expeditious construction of the Facilities and of such generating and transmission facilities of subsidiaries of the Sponsoring Companies as the AEC deems necessary for the security of service to it hereunder.

SECTION 2.05. *Ownership of Facilities:* All the Facilities shall be the responsibility of the Company and shall be and remain the property of the Company.

SECTION 2.06. *Review and Recommendations by the AEC:* While it is recognized that the construction and operation of the Facilities are the responsibility of the Company, the costs thereof are related to the AEC's cost of power under this contract. Accordingly, the AEC may review and discuss with the Company its engineering design, purchasing, subcontracting, construction and operating plans, estimates, practices and procedures and make recommendations with respect

thereto which in the judgment of the AEC may provide for economies in construction and operation, for assuring reliability of service hereunder, and for assurance that the Facilities are designed to conform as nearly as is practicable with this contract and Appendix A hereto; and the Company will adopt such recommendations of the AEC as may be mutually agreed upon. The AEC shall have access to the Facilities for this purpose. The Company will keep the AEC reasonably informed as to prospective dates of commercial operation of the various units included in the Facilities, and shall furnish the AEC monthly progress and cost reports in such reasonable detail as will adequately reflect current status.

ARTICLE III.

Power Supply.

SECTION 3.01. *Service to be Supplied by Company and Taken by AEC:* After commencement of commercial operation of the first unit and prior to commencement of commercial operation of the third unit of the Facilities, the Company shall be obligated to supply, and the AEC to pay for, the Preliminary Contract Capacity under and subject to the provisions of this contract, and after commencement of commercial operation of the third unit the Company shall be obligated to supply, and the AEC to pay for, the Contract Capacity under and subject to the provisions of this contract; *provided however,* that if more than one generating unit included in the Facilities shall be shut down by reason of conditions beyond the Company's control, or if one such unit shall be shut down for scheduled maintenance or overhaul or with the consent of the AEC and another one or more of such units shall at the same time be shut down by reason of conditions beyond the Company's control, the Company's obligation shall be to supply Preliminary Contract Capacity or Contract Capacity, as the case may be, less one-third of Contract Capacity for each unit in excess of one which is shut down. The AEC may schedule or take service at any rate which would not require the operation of any generating unit of the Facilities at a rate less than the equivalent of 70 Mw at the Primary Delivery Points except as may be mutually agreed to from time to time and which would not, except upon reasonable notice, result in starting up or shutting down any such unit. Reasonable notice, for the purpose of this Section, will be established by agreement among the Company, the AEC and TVA. The AEC will

not be entitled to service at a rate greater than is provided in the first sentence of this Section, but if at any time the AEC shall wish service at such greater rate, the Company will use its best efforts to furnish such service. To the extent that service at such greater rate shall be less than Preliminary Contract Capacity or Contract Capacity, whichever shall be then applicable, such service shall be furnished to the AEC at the cost to the Company of obtaining such service from the most economical outside source at the time available. To the extent that service at such greater rate shall exceed Preliminary Contract Capacity or Contract Capacity, whichever shall be then applicable, such service shall be at such just and reasonable rate or rates as may be quoted at such time by the Company.

SECTION 3.02. *Delivery Arrangements with TVA and Utilization of Power and Energy:* The AEC will arrange with TVA for the acceptance by TVA of power and energy scheduled by or for the AEC and delivered by the Company hereunder and for the delivery of such amount of power and energy by TVA to the AEC; and it is understood that all such power and energy as provided in Section 3.01 will be available to the AEC at all times up to 100% load factor and will not be for resale by the AEC except as specifically provided.

SECTION 3.03. *Supply of Reactive Power:* The Company will be obligated to supply such reactive power as is applicable to a 93% power factor of the amount of power at the time deliverable in accordance with the Company's obligation hereunder, except that at a time when the AEC has scheduled power deliveries hereunder at a rate less than the Company is then obligated to provide and as a result there is reactive capacity in any generating unit being operated which reactive capacity is in excess of that required to supply the scheduled power deliveries, and which reactive capacity it would be possible to utilize, consistent with the standard of operation referred to in the last sentence of Section 2.01, to generate additional reactive power without adversely affecting scheduled power deliveries to the AEC, the Company will at the request of the AEC supply additional reactive power from the capacity so available for such purpose. The AEC will make arrangements with TVA so that reactive power shall not be taken from the Company in excess of that which the Company has hereinbefore agreed to supply.

SECTION 3.04. *Resales to Contractors, Tenants and Concessionaires:* The AEC shall have the right at any time to resell or provide power and energy to which it is entitled hereunder to its contractors, tenants and concessionaires for their consumption at or in the vicinity of a Project.

SECTION 3.05. *Use of Power by Successors at a Project:* The AEC shall have the right to resell or dispose of any part of the power and energy to which it is entitled hereunder at any time, to any public or private successor operator of a Project or any portion thereof or to any other agency of the United States Government for consumption at the site of a Project.

SECTION 3.06. *Transfers of Power for Use at Other Government Installations:* Except as provided below in this Section, the AEC shall have the right at any time, to the extent that power and energy shall no longer be required at a Project, to transfer all or any part of the power and energy to which the AEC is entitled hereunder in blocks of not less than 7,500 Kw, to supply service for any new requirement not previously served or any new requirement in excess of that previously served by the Company or the systems of the Sponsoring Companies at a United States Government installation for consumption in operations at such installation, provided such transfer hereunder shall be lawful and shall not impair the validity of this contract. If the AEC shall desire to exercise such right, it shall give notice thereof to the Company. If the AEC shall desire to make such transfer through facilities provided by the Company or the systems of the Sponsoring Companies and if the Company and such systems agree thereto, such power and energy shall be delivered by the Company for such period as may be mutually agreed upon, to the point agreed upon at the rates provided for herein, adjusted to reflect any change in cost to the Company resulting from the method of delivery employed. If, however, within 60 days after receipt of such notice the Company shall undertake to release the AEC from liability with respect to all further charges payable by the AEC with respect to such power and energy as of (i) the later of (a) one year after such notice, or (b) the day on which such power and energy could have been used at such United States Government installation, or (ii) such earlier date, if any, whe

the Company shall be able to absorb such power and energy in its system or in the systems of the Sponsoring Companies, then, in either such case, the Company shall, as of the date when the AEC is released from such liability, have the right to dispose of such power and energy in any manner it may determine.

SECTION 3.07. *Characteristics of Supply and Points of Delivery:*

1. All electric service delivered hereunder at the Primary Delivery Points shall be 3 phase, 60 cycle at a voltage of approximately 170 Kv, or such other voltage as may be mutually agreed upon from time to time. The Company will cooperate with the AEC and TVA to maintain the agreed upon voltage at the Primary Delivery Points so that it will not vary more than plus or minus 5% or such other limits as may be mutually agreed upon.

2. All electric service delivered hereunder at the Secondary Delivery Points shall be 3 phase, 60 cycle at practicable delivery voltages.

ARTICLE IV.

Rates.

SECTION 4.01. *Base Capacity Charge and Capacity Charge:* The Base Capacity Charge for the Contract Capacity hereunder shall be \$9,052,050 per year, which takes into account but is not limited to interest and amortization on debt incurred in providing the Facilities and on \$1,135,000 for certain transmission facilities not included in the Facilities, return on equity, fixed operation and maintenance, no-load fuel, costs with respect to federal income taxes, and all other elements of cost (except costs provided for in Sections 4.08 and 4.11), all as described or referred to in Appendix C, incurred for the purpose of putting the Company in a position to deliver the Contract Capacity hereunder. The Capacity Charge shall be the Base Capacity Charge as adjusted by the adjustments specified in Sections 4.02, 4.03 and 4.10 and shall be payable, in accordance with Article V, at the rate of one-twelfth each month.

Section 4.02. *Adjustment of Base Capacity Charge for Changes in Cost of Facilities:* There shall be added to or subtracted from the Base Capacity Charge 50% of an amount computed at the rate of $56,050 per year for each $1,000,000 by which the sum of the cost of the Facilities plus $3,135,000 is greater or less than $107,250,000; *provided however,* additions to the Base Capacity Charge for or on account of the adjustment provided for in this paragraph shall not exceed $273,244 per year. For the purpose of this adjustment, the cost of the Facilities shall include all components of cost for organization and financing of the Company and for investigating and planning for and construction of the Facilities. The elements of cost included in the term "construction" in the last preceding sentence shall be determined in accordance with the Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (herein called the Uniform System of Accounts). Cost for purposes of this Section shall be mutually determined not later than 18 months after the commencement of commercial operation of the third generating unit included in the Facilities; *provided however,* that for the period between the commencement of commercial operation of the first generating unit and the determination of such cost, the cost of the Facilities shall be estimated as nearly as practicable, subject to retroactive adjustment upon final determination of such cost.

Section 4.03. *Periodic Adjustments:*

1. There shall be added to or subtracted from the portion of the Base Capacity Charge applicable to each month an amount computed at the rate of $3,500 per month for each 1¢ by which the average cost of coal delivered (unloaded) at the Facilities during the immediately preceding six-months' period ending with June 30 or December 31, as the case may be, is greater or less than 19¢ per million Btu; *provided however,* that such adjustment for the period ending with the next succeeding June 30 or December 31, as the case may be, after the commencement of commercial operation of the first unit of the Facilities shall be made after such June 30 or December 31 and shall be based upon the average cost of coal delivered (unloaded) at the Facilities prior to such date, and such average cost of coal so delivered prior to such date shall also constitute the basis for the monthly adjustment

provided for in this Section during the next succeeding six months' period. The "cost of coal delivered (unloaded) at the Facilities," as used in this Section and in Section 4.05, means the cost to the Company of the coal through the first handling thereof from the barges, cars or other conveyances of the carrier by which the coal is shipped to the Facilities, including operation and maintenance of unloading equipment and any taxes and other imposts assessed against or upon the coal, its extraction, sale, transportation or use, which the Company is required to pay.

2. On the first day of each calendar quarter, there shall be subtracted from or added to the portion of the Base Capacity Charge applicable to each month of the succeeding quarter 1/12 of the amount by which \$536,250 is greater or less than the result of a calculation pursuant to the following formula:

$$\frac{ER}{100 - R}$$

In the foregoing formula:

E = Return on equity capital which is fixed at \$495,000 when the cost of the Facilities, determined in accordance with Section 4.02, is exactly \$104,115,000, and is increased by an amount computed at the rate of \$28,625 for each \$1,000,000 by which such cost of the Facilities is less than \$104,115,000, or is decreased by an amount computed at the rate of \$28,025 for each \$1,000,000 by which such cost of the Facilities is greater than \$104,115,000 and not in excess of \$113,865,000, and is decreased by an amount computed at the rate of \$56,050 for each \$1,000,000 by which such cost of the Facilities is greater than \$113,865,000 until E equals zero.

R = Estimated composite rate of applicable Federal taxes levied upon or measured by income, expressed as a percentage and determined for the succeeding quarter-yearly period by agreement.

Until determination of the cost of the Facilities as provided in Section 4.02, such cost shall be estimated as nearly as practicable by the

Company and concurred in by the AEC. In the event of changes in applicable laws making the provisions of this paragraph 2 inequitable, the parties will agree on an amendment of this provision to the end that such changes in law shall alter the effect of this provision to the minimum extent practicable.

SECTION 4.04. *Base Energy Charge and Energy Charge:* The Base Energy Charge for all energy delivered at Primary Delivery Points and Secondary Delivery Points hereunder shall be 1.863 mills per Kwh, which takes into account but is not limited to the cost of coal or other fuel for operation of the Facilities, the cost of operating labor and other operating and maintenance expenses and all other elements of costs and expenses (except costs provided for in Sections 4.08 and 4.11), all as described or referred to in Appendix C, incurred or paid in providing services hereunder except those taken into account in the Capacity Charge. The Energy Charge for all energy so delivered shall be the Base Energy Charge adjusted by the adjustments specified in Sections 4.05 and 4.06.

SECTION 4.05. *Adjustment for Cost of Coal:* The Base Energy Charge for each month shall be adjusted upward or downward by an amount computed at the rate of 1/11th mill per Kwh for each 1¢ of increase above or decrease below 19¢ per million Btu in the cost of coal delivered (unloaded) at the Facilities during the immediately preceding six-months' period ending with June 30 or December 31, as the case may be: *provided however,* that such adjustment for the period ending with the next succeeding June 30 or December 31, as the case may be, after the commencement of commercial operation of the first unit of the Facilities, shall be made after such June 30 or December 31 and shall be based upon the average cost of coal delivered (unloaded) at the Facilities prior to such date, and such average cost of coal so delivered prior to such date shall also constitute the basis for the monthly adjustment provided for in this Section during the next succeeding six-months' period.

SECTION 4.06. *Adjustment for Cost of Labor and Other Operating and Maintenance Expenses:* For each month during each six-months period beginning with January or July, there shall be added to the

subtracted from the Base Energy Charge an amount computed at the rate of 1/100th mill per Kwh for each 4¢ of increase above or decrease below $1.97 in the six-month average of Hourly Earnings of Production Workers in Gas and Electric Utility Industries, compiled by the Bureau of Labor Statistics, or compiled by any Governmental successor of said Bureau which may take over the compilation of such statistics, for the preceding six-months' period ending with September or March. Each such adjustment shall be made on the basis of the delivery of 400,000,000 kilowatt hours in each month after commencement of commercial operation of the third unit of the Facilities, and on the basis of the delivery of such proportion of 400,000,000 kilowatt hours as Preliminary Contract Capacity bears to Contract Capacity in each month prior to commencement of operation of the third unit. If the basis or method of compiling said Hourly Earnings of Production Workers in Gas and Electric Utility Industries should be changed in any way, the parties agree that this Section will be amended as may be necessary in order to preserve without alteration the effect of the adjustment herein provided for.

SECTION 4.07. *Preliminary Contract Capacity and Preliminary Capacity Charge:* Prior to commercial operation of the third unit included in the Facilities, the full Contract Capacity provided for herein shall not apply but Preliminary Contract Capacity shall apply. Preliminary Contract Capacity shall be as follows: upon commencement of commercial operation of the first unit, Preliminary Contract Capacity shall be 200,000 Kw; and upon commencement of commercial operation of the second unit and until the third unit shall commence commercial operation, Preliminary Contract Capacity shall be 400,000 Kw. During the period while Preliminary Contract Capacity is applicable, the Preliminary Capacity Charge shall be the amount which bears the same ratio to the Capacity Charge as the then applicable Preliminary Contract Capacity bears to the full Contract Capacity. Until completion of the Facilities and determination of their cost as provided in Section 4.02, Preliminary Capacity Charges shall be determined by utilizing the Base Capacity Charge, and such determinations shall be subject to adjustment upon the determination of the cost of the Facilities as provided in said Section.

SECTION 4.08. *Certain Tax Costs Other Than Federal Income Taxes:*

1. In addition to the Capacity Charge, determined as provided in Sections 4.01, 4.02, 4.03, 4.07 and 4.10, and the Energy Charge, determined as provided in Sections 4.04, 4.05 and 4.06, the AEC will pay to the Company for capacity and energy hereunder an amount equivalent to all state, local and federal taxes of every kind or character (except federal income taxes), payable by the Company or accrued during the term of this contract, including such taxes, if any, on all amounts paid to the Company under this Section, so that the amounts received by the Company for capacity and energy hereunder shall be net after all such taxes; *provided however,* that the AEC shall not be required to pay to the Company an amount equivalent to taxes at rates in effect April 10, 1954, for Social Security, such as State Unemployment, Federal Unemployment, Federal Old Age Benefits and similar taxes then applicable to payrolls, or equivalent to sales and use taxes on operating supplies and taxes and other imposts on coal, its extraction, sale, transportation or use, as provided in Sections 4.03 and 4.05, or to the extent that an amount equivalent to any taxes or imposts may hereafter be taken into account in the Capacity Charge or the Energy Charge paid by the AEC to the Company; and *provided further,* that income tax costs (other than for federal income taxes), based upon net income, included in the payments to be made by the AEC under this Section with respect to any tax year shall not exceed taxes on taxable income represented by earnings after taxes for such year of $495,000, except that, to the extent that income taxes based upon $495,000 of earnings shall not be paid with respect to any year due to the fact that the Company did not realize earnings in that amount, the difference between the tax cost payment actually made with respect to such year and the tax cost payment which would have been made with respect thereto had the Company earned $495,000 in such year, shall be available as a carry-forward in determining the maximum taxes payable in any future year or years; and *provided further,* that to the extent that the Facilities are used for purposes other than the supply of capacity and energy to or for the AEC and the Company derives income therefrom and incurs tax liabilities as a result of such use or income, and to the extent that the Company may incur tax liabilities based upon activities other than those

for or arising out of the performance of this contract or properties other than those acquired in that connection, such tax liabilities shall be discharged at the sole cost and expense of the Company. The Company will maintain records of the revenues derived from any such other use, activity or ownership, and of the incremental cost of generating the energy produced through such other use or income derived from such other activity, so that the tax liabilities arising therefrom may be determined and excluded from bills payable by the AEC.

2. (a). The Company agrees to notify the AEC of any state or local tax of any kind or character levied or purported to be levied on or collected from the Company and constituting a reimbursable item of costs under paragraph 1 above if due and payable, but which (1) in the opinion of the Company or of the AEC, as communicated to the Company, is inapplicable or invalid, or (2) is of a category as to which the AEC has notified the Company that the AEC reserves the right of approval of payment. The Company further agrees to refrain from paying any such tax, unless authorized by the AEC. Any tax paid with the approval of the AEC or on the basis of advice from the AEC that such tax is applicable and valid, and which would otherwise be a reimbursable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax was in fact inapplicable or invalid except to the extent that a refund of such tax is obtained.

(b) The Company agrees to take such action as may be required or approved by the AEC to cause any such tax referred to in (a) above to be paid under protest, and to take such actions as may be required or approved by the AEC to seek recovery of any payment made, including assignment to the Government of all rights to an abatement or refund thereof, and granting permission for the Government to join with the Company in any proceedings for the recovery thereof.

(c) The Company shall give the AEC immediate notice in writing of any action filed against the Company arising out of its compliance with the provisions of this paragraph 2 and shall furnish promptly to the AEC copies of all pertinent papers received by the Company with respect to such action. The Company, with the approval of the AEC, may settle any such action and, if requested by the AEC, shall authorize

representatives of the Government to settle or defend any such action and to represent the Company in, or to take charge of, any such action. If the settlement or defense of any such action is undertaken by the Government, the Company shall furnish all reasonable assistance in effecting a settlement or asserting a defense. If the Government does not authorize a settlement or assume the defense of such action, the Company shall proceed with the defense in good faith and, in such event, the defense of the action shall be at the expense of the AEC. If the AEC directs the Company to institute litigation to enjoin the collection of, or to recover payment of, any such tax, the Company shall proceed with the litigation in good faith as directed from time to time by the AEC, and, in such event, the AEC shall reimburse the Company for its costs and expenses incurred on account of such litigation.

(d) The Government shall save the Company harmless from penalties, interest and other expenses, costs and charges of any kind incurred by the Company through compliance with this paragraph 2.

3. In the event that any of the taxes or imposts at rates in effect at April 10, 1954, which are mentioned in the first proviso of paragraph 1 of this Section, should be reduced below such rates or should be repealed, an equitable adjustment to give effect thereto will be made in the Capacity Charge or the Energy Charge, as the case may be.

SECTION 4.09. *Adjustment in Absence of Sinking Fund Depreciation Ruling:* This contract was entered into with the intention that the amount of debt retirement would be approximately equivalent to the amount of depreciation on an annual basis and that depreciation would be allowable under a sinking fund method. If the Company should be unable to obtain from the Secretary of the Treasury or other duly authorized official a ruling, closing agreement or other agreement satisfactory to the Company permitting it to deduct depreciation for purposes of federal income taxes on the depreciable property included in the Facilities on a 31-year sinking fund formula with interest at the rate of 3½% per annum, or if such ruling, closing agreement or other agreement once obtained should be reversed, rescinded or rendered invalid or ineffective, with the result that the Company will not be able on the aforesaid basis to recover fully the undepreciated cost of the Facilities over the unexpired portion of the 31-year period, the parties

will enter into appropriate amendments or supplements to this contract to provide that the AEC shall thereafter at such intervals and during such periods of time as may be from time to time agreed upon make adjusted payments to the Company for power and energy hereunder in an amount estimated to be adequate to provide the Company with funds, together with the applicable portion of the debt money component of the Capacity Charge, sufficient to maintain the intended relationship between depreciation and debt retirement and also to permit the Company to comply with any sinking fund or analogous requirements of any instrument pursuant to which indebtedess of the Company shall have been issued or incurred as contemplated by this contract. The deduction of depreciation for Federal income tax purposes on the basis stated above constitutes a part of the basic cost structure of this contract and of the furnishing of facilities for the supply of services hereunder, and therefore the obligation of the AEC under this Section is a portion of such basic cost structure. Consequently, unless the Company shall obtain from the Secretary of the Treasury or other duly authorized official a closing agreement or other agreement satisfactory to the Company covering such sinking fund depreciation, the obligation of the AEC under this Section shall survive any cancellation or termination of this contract other than the expiration of this contract at the end of the 25-year term provided for in Section 7.01, except that the parties may agree in writing that such obligation may be modified or terminated and cancelled in connection with any cancellation or termination of this contract. If the Company shall be able and shall elect to deduct depreciation for purposes of Federal income taxes on the basis of a formula more favorable than the sinking fund depreciation formula contemplated by this Section, the parties will review the effect of such change in the formula as well as the considerations specified in Section 4.12 and will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 4.10. *Termination or Cancellation Adjustments:* Upon termination of this contract in whole or in part as provided in Section 7.02, the Capacity Charge, the amounts payable pursuant to Section 4.11, and the amount of tax costs payable under Section 4.08 which are not directly distributable as provided below, shall be reduced at the

same time or times and in the same proportion as the Contract Capacity is reduced pursuant to Section 7.02, Section 7.03 or paragraph 3 of Section 7.07. Tax costs provided for in Section 4.08 which are levied on any basis capable of direct distribution shall be allocated directly to the AEC and the Company in amounts reflecting the proper share of each.

SECTION 4.11. *Replacement Reserve:* As a part of the cost structure of this contract and for the purpose of providing for the cost of replacements to the Facilities, the AEC will make payments to the Company as provided in this Section. With respect to each of the first sixty months after the commencement of commercial operation of the first unit included in the Facilities, the AEC will pay to the Company an amount equivalent to one-twelfth of $524,000; *provided however,* that with respect to any period as to which there is in effect a ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes, the amount so to be paid to the Company shall be equal to one-twelfth of $262,000. Starting with the 15th day of the 60th month after the commencement of commercial operation of the first unit included in the Facilities, and on the 15th day of the last month of each calendar quarter thereafter, the Company will prepare an estimate of the cost to be incurred by the Company for replacements during the succeeding calendar quarter and will furnish a copy of such estimate to the AEC Such cost of replacements shall consist of the sum of

(i) the estimated amount of expenditures by the Company during such quarter in respect of replacements, less estimated net salvage credits, which expenditures will be chargeable to property and plant in accordance with the Uniform System of Accounts; *provided however,* that such estimated amount of expenditures and all prior credits to the replacement reserve as hereinafter provided for shall not exceed an amount, cumulative over the term of this contract (and, if extended pursuant to Section 7.08, over the period of any such extension or extensions) equal to one-fourth of 1% annually of the cost of the Facilities, such cumulative amount to be increased or decreased, however, by the percentage by which such estimated amount of expendi-

tures and all prior charges to the replacement reserve exceeds or is less than the total original cost, at the time of installation, of all units of property previously replaced or to be replaced during such quarter; and

(ii) with respect to any period as to which there is no ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes, an amount equivalent to the amount derived pursuant to clause (i), less any additional estimated depreciation accruing during such quarter and applicable to replacements theretofore made by the Company and paid for out of funds derived from charges to the replacement reserve.

With respect to each month commencing with the 61st month after commencement of commercial operation of the first unit in the Facilities, the AEC shall pay to the Company ⅓rd of the amount of the cost of replacements determined pursuant to clauses (i) and (ii) with respect to the quarter in which such month occurs. The Company will maintain on its books a replacement reserve and will credit to such reserve all amounts received by it from the AEC under this Section after deducting therefrom Federal income taxes, if any, which may be payable by the Company with respect to the receipt by it of such payments after reflecting the effect of any additional depreciation referred to in clause (ii). All charges for replacements, except replacements paid for out of the proceeds of insurance or out of amounts paid to the Company by third parties, shall be charged to the replacement reserve. Any net earnings, after any applicable taxes thereon, resulting from investment of the Company's funds allocable to the replacement reserve, will be credited to such reserve. The Company will apply promptly for a ruling of the Internal Revenue Service that payments under this Section are not subject to Federal income taxes. The prior approval of the AEC shall be obtained for any replacement of a unit of property at a cost in excess of $100,000, provided that if any such replacement shall be necessary under any indenture or other agreement pursuant to which indebtedness of the Company shall have been issued or incurred in order to prevent a default thereunder, no such approval shall be required. When the aggregate amount of charges (net of

salvage) to the replacement reserve equals the adjusted cumulative amount derived pursuant to the proviso in clause (i), or at the end of the fifth year after the beginning of full-scale operation, whichever is earlier, and at intervals of three years thereafter, and at such other time or times as the parties may agree upon, the parties hereto will jointly examine and review the matter of payments under this Section and will enter into appropriate amendments of this contract in order that the Facilities shall be kept in a dependable and efficient operating condition and that the provisions of this Section shall be equitable to both parties with respect to costs incurred by the Company by reason of this Section and payments made by the AEC hereunder. Upon the expiration of this contract, either at the end of the term provided for in Section 7.01 or any extended term, or by termination or otherwise, any amount of the Company's funds in the replacement reserve shall be retained by the Company, paid to the AEC or divided between the Company and the AEC as shall be agreed by the parties to be fair and equitable in the light of prior operations hereunder and the results thereof and giving effect to accumulated replacement requirements necessary to place the Facilities in a dependable and efficient operating condition in accordance with practices prevailing among prudent operators of similar properties.

SECTION 4.12. *Refinancing by Company at Lower Interest Rate:* If in the future the Company shall refinance all or any part of its debt securities so that the aggregate interest thereafter payable by the Company on all its outstanding debt securities shall be at a rate of less than 3½% per annum thereon, the parties will review operations hereunder and the results thereof from the inception of such operations, any increase in the debt security financing costs of the Facilities over an over-all rate of 3½% per annum, and all other factors having a bearing upon the effects of this contract as compared with its anticipated effects, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 4.13. *Effect of Adding Units to the Facilities:* If in the future and at the site of the Facilities the Company should build additional facilities or additions to the Facilities, the parties will review

the effect of such change upon the Company's cost of delivering power and energy hereunder, as well as the considerations specified in Section 4.12, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

SECTION 4.14. *Over-All Billing Adjustment:*

1. In addition to the adjustments set forth in Sections 4.02, 4.03, 4.05 and 4.06, there shall be a cumulative adjustment, the effect of which shall be to divide equally between the AEC and the Company all revenue derived from service rendered to the AEC under this contract in excess of revenue required to provide net income for Company at the rate of $495,000 per annum, increased or decreased by the same amount by which the Base Capacity Charge is decreased or increased, respectively, under Section 4.02. Such latter net income is referred to in this Section as Adjusted Net Income. To the extent that the aggregate revenue derived from operations under this contract for any twelve-month period starting with the commencement of commercial operation of the third generating unit included in the Facilities, or starting with any anniversary thereof, and for all such prior twelve-month periods, shall exceed the aggregate revenue required to provide the Company net income equivalent to Adjusted Net Income for such twelve-month period and all such prior twelve-month periods, the Company shall credit such excess revenue to a Special Reserve Account, and shall impound and deposit such excess in a Special Fund which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions. Any net earnings after any applicable taxes thereon, resulting from the investment of such impounded funds shall be credited to the Special Fund. Net income earned by the Company from the sale of reserve capacity or of energy produced through the use of reserve capacity or Contract Capacity not taken by the AEC, or otherwise resulting from activities of the Company other than those for or arising out of the performance of this contract, shall be separately accounted for and shall have no effect upon the determination of net income or Adjusted Net Income under this Section. To the extent that net income derived from operations under this contract for any such twelve-month

period is less than Adjusted Net Income, the Company shall charge the Special Reserve Account and shall be entitled to payment from the Special Fund of such amount as shall be necessary to make up net income for such twelve-month period for the Company equivalent to Adjusted Net Income. When and if the Special Reserve Account shall exceed $500,000 on any December 31, the AEC shall be entitled to one-half of the excess thereof over $500,000 and one-half of such excess shall become available to the Company as a part of its general funds. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, any balance remaining in the Special Fund shall be divided equally between the Company and the AEC. By agreement between the parties the operation of the provisions of this Section may be put on a calendar year basis. For purposes of this Section net income shall be derived in accordance with the Uniform System of Accounts for Public Utilities and Licensees prescribed by the Federal Power Commission as effective January 1, 1937, and further shall be determined after setting aside in a Reserve for Deferred Maintenance any unexpended portion of the estimated maintenance expense set forth in Appendix C for the period in question. Any net earnings, after any applicable taxes thereon, resulting from the investment of funds reserved for deferred maintenance shall be credited to the Reserve for Deferred Maintenance. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, the Company and the AEC shall agree upon the amount necessary, giving effect to accumulated maintenance requirements, to place, or to provide for placing, the Facilities in the dependable and efficient operating condition required for providing the service herein provided for during the unexpired term, including permissible extensions thereof under Section 7.08 hereof, all in accordance with practices prevailing among prudent operators of similar properties. If, after providing for such maintenance, any amount shall remain in the Reserve for Deferred Maintenance, such amount shall be equally divided between the parties.

2. In the event of partial termination as provided in Section 7.02, the amount of Adjusted Net Income and the $500,000 level for the Special Reserve Account shall be reduced in the same proportion as the Contract Capacity is reduced pursuant to Section 7.02, Section 7.03 or

paragraph 3 of Section 7.07. If at the effective date of any such reduction, there should be any amount in the Special Fund in excess of the reduced level therefor, such excess shall be divided equally between the Company and the AEC.

3. In the event that any income taxes should in the future be required to be paid on account of the receipt of any amount deposited in the Special Fund, such taxes shall be charged to the Special Reserve Account and paid out of the Special Fund, and any refunds of taxes so paid shall be credited to the Special Account and deposited in the Special Fund. Similarly, if, after payment of any such taxes out of the Special Fund, the payment or credit out of the Special Fund to the AEC of amounts with respect to which such taxes had been so paid results in a reduction of taxes otherwise payable by the Company, then an amount equal to such reduction shall be credited to the Special Account and deposited in the Special Fund and shall promptly thereafter be paid or credited to the AEC.

Section 4.15—*Limitation on Earnings:* In addition to the other limitations contained in other sections of this contract, it is the intention of the parties that although there is no limitation on the possible losses to the Company under this contract, the amount available to the Company as net income during the life of this contract derived from operations under this contract shall not exceed $600,000 per annum. To the extent that the aggregate amount available to the Company as net income derived from operations under this contract for any twelve-month period starting with the commencement of commercial operation of the third unit to be included in the Facilities, or starting with any anniversary thereof, and for all such prior twelve-month periods, is in excess of the maximum aggregate net income allowable to the Company under this Section the Company shall credit such excess income to a Limitation Account, and shall impound and deposit such excess in a Limitation Fund which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions. Funds deposited in the Limitation Fund shall be invested in securities approved by the Commission. Any net earnings, after any applicable taxes thereon, resulting from the invest-

Added b
Supplem

ment of such funds, shall be deposited in the Limitation Fund. To the extent that the amount available to the Company as net income derived from operations under this contract for any such twelve-month period (or portion thereof at the expiration of this contract) is at a rate less than the maximum annual net income allowable to the Company under this Section, the Company shall charge the Limitation Account and shall be entitled to payment from the Limitation Fund of such amount as shall be necessary to make available to the Company net income for such twelve-month period (or portion thereof) at a rate equivalent to the maximum annual net income allowable to the Company under this Section. By agreement between the parties, the operation of the provisions of this Section may be put on a calendar-year basis. Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, any balance remaining in the Limitation Fund shall be paid to the AEC.

ARTICLE V.

Billing and Payment.

SECTION 5.01. *Billing:*

1. The Company shall submit to the AEC as early as practicable in each month a bill for (a) the portion of the Base Capacity Charge and the Base Energy Charge or, if available, for the portion of the Capacity Charge and the Energy Charge, for power and energy hereunder during the preceding month, and (b) the aggregate amount payable by the Company in the next succeeding month for or on account of taxes constituting the basis for payments by the AEC pursuant to Section 4.08. The Company shall also submit to the AEC as early as practicable in each month a bill or credit memorandum for any amounts due the Company or the AEC for the preceding month on account of any of the adjustments provided for in Sections 4.02, 4.03, 4.05, 4.06 and 4.08 and not included in the bill provided for in the preceding sentence; *provided however,* that the Company may render such bills or credit memoranda for any or all such adjustments on a quarterly basis or such other basis as may be mutually acceptable, and may include therein the adjustment for any item not included in a pre-

vious bill or credit memorandum. Each such bill or credit memorandum shall include such detail as the AEC may request. After the termination of this contract, whether by expiration of the term hereof or otherwise, adjustments, by payment, credit or otherwise as may be agreed upon, shall be made for all liabilities hereunder accrued up to the date of termination.

2. The Company may bill the AEC separately each month for reimbursement of the cost of replacements as provided in Section 4.11 or may include such charges as separate items in bills submitted pursuant to paragraph 1 of this Section.

SECTION 5.02. *Payment*: Bills submitted pursuant to Section 5.01 shall be paid by the AEC within fifteen days after receipt thereof. Each such bill and each credit memorandum submitted pursuant to Section 5.01, whether or not paid or otherwise taken into account, shall be subject to such subsequent corrections as may be appropriate, including corrections as a result of audits, corrections arising by reason of subsequent determination or redetermination of taxes by any taxing authority, and any other correction based upon a subsequent ascertainment or determination of data underlying the amount of such bill or credit memorandum; and any amount found to be due to either party as the result of any such correction shall be discharged by payment to such party by the other, by being taken into account in a subsequent bill or credit memorandum, or otherwise.

ARTICLE VI.

Measuring Instruments.

SECTION 6.01. *Measuring Instruments:* The Company shall own and maintain on its property the metering equipment which will be necessary to provide complete information regarding the flow of power and energy from the Company's generating station to the Primary Delivery Points as well as to others. The measurements taken on such metering equipment will be appropriately adjusted for losses in transmission between the points of measurement and the Primary Delivery Points. The AEC may, at its option and expense, install check meters. The Company will make such periodic tests and inspections of its meters

as may be necessary to maintain the same at the highest practical commercial standard of accuracy and will advise the AEC promptly of the results of any such test which shows any inaccuracy more than 1% slow or fast. The AEC shall be given notice of and may have representatives present at such tests and inspections. The Company will make additional tests of its meters at the request of the AEC and in the presence of the AEC's representatives. If such periodic or additional tests show that a meter used for billing is accurate within 1% slow or fast, no correction shall be made in the billing to the AEC; but if such tests show that such meter is inaccurate by more than 1% slow or fast, correction shall be made in the billing to the AEC for the previous month, or from the date of the latest test if within the previous month and for the elapsed period in the month during which the test was made; *provided however*, that no correction shall be made for a longer period than that during which it may be determined by mutual agreement that the inaccuracy existed. Measuring instruments of existing Secondary Delivery Points are covered by existing agreements or arrangements between TVA and others which are not affected by this contract. The Company will use its best efforts to see that arrangements for Secondary Delivery Points between subsidiaries of the Sponsoring Companies and TVA shall provide the AEC with substantially the same terms and conditions of test and billing adjustment as are provided for Primary Delivery Points by this Section.

SECTION 6.02. *Measurement of Maximum Demand:* Whenever it shall be necessary to measure or compute the maximum demand of the AEC load, such maximum demand shall be taken as the highest average simultaneous load measured in kilowatts, or otherwise as agreed, at the Primary Delivery Points and Secondary Delivery Points during any clock hour in the period under consideration.

ARTICLE VII.

Term of Agreement.

SECTION 7.01. *Duration*. The term of this contract as a contract for electric utility service shall be for a period of 25 years starting with the date of the commencement of commercial operation of the first

unit of the Facilities. Such date shall be the first day on which the first unit is in a position to deliver commercially hereunder Preliminary Contract Capacity substantially as defined in Section 4.07. The Company shall notify the AEC on this date and said 25-year term shall commence with said date the same as if it were written into this Section. The Company will similarly notify the AEC of the date of the commencement of commercial operation of each of the other units of the Facilities.

SECTION 7.02. *Termination:* After the commencement of commercial operation of the third unit of the Facilities, or 42 months after the effective date hereof, whichever is earlier, the AEC shall have the right to deliver to the Company a written notice of termination of this contract in whole or in part, and such termination shall become effective on the date three years after the date of receipt by the Company of such notice or, at the option of the AEC to be exercised by a further writing delivered to the Company within twelve months of the date of delivery of such notice of termination, such termination shall become effective on the date four years after the date of receipt by the Company of such notice of termination. The AEC shall be entitled to transfer, by assignment or otherwise, the right to take power and energy hereunder to the extent terminated, during such notice period or any balance thereof, to any other agency of the United States Government, whether for use by such agency or for resale; and if such transfer is made by assignment, such agency shall agree to pay all amounts, whether by way of Capacity Charge, Energy Charge, adjustments, tax costs, or otherwise, which would have been paid by the AEC with respect to such power and energy in the absence of such assignment: *provided however*, that no assignment shall be made unless such other Governmental agency shall have the lawful authority to accept such assignment, enter into such agreement and make such payments. If at any time during such notice period the AEC shall desire to have the Company take over on a firm basis all or any portion of the capacity hereunder affected by a notice of termination delivered as above provided, and if the Company shall agree to such taking over, the Company and the AEC will fix upon a mutually agreeable date for such taking over by the Company. When and as any such assignment shall become effective but only until the expiration of such assignment, or as capacity is so

taken over by the Company, Contract Capacity shall be reduced by an amount corresponding to the amount of capacity so assigned or taken over. In such connection, the Company shall have the right to elect, at the time when such capacity is so taken over by it, to treat the capacity so taken over, to the extent that it will suffice, as an anticipated fulfillment of the minimum obligations of the Company to absorb Contract Capacity on an annual basis under Section 7.03.

SECTION 7.03. *Contract Capacity After Termination:* In the event of a termination of this contract either as to the entire Contract Capacity or as to any portion thereof, the Company, after the effective date of the termination and subject to the provisions of Section 7.05, shall be entitled to absorb and shall absorb the Contract Capacity as to which termination shall have become effective as rapidly as the growth of its load will permit; but the Company will, in any event and regardless of the amount of Contract Capacity absorbed in any prior period, absorb at least 100,000 Kw of Contract Capacity as of the effective date of termination and 100,000 Kw of Contract Capacity as of each anniversary thereafter of the effective date of termination until the entire Contract Capacity as to which termination shall have become effective shall have been absorbed, and in the event of termination of the entire Contract Capacity, the Company shall absorb the entire amount thereof not later than the fifth anniversary of the effective date of termination. The Company will not make commercial use of unabsorbed capacity except pursuant to agreement with the AEC. The AEC may assign all or any part of any balance of such terminated Contract Capacity not absorbed by the Company to another Governmental agency, subject to the Company's right and obligation to absorb further capacity as set forth above, provided that the payments for power and energy associated with the assignment to such Governmental agency shall be at a rate giving recognition to any change in costs then encountered or foreseen by the Company and shall be subject to approval by the Federal Power Commission or such other regulatory commission as may have jurisdiction, that such agency shall have lawful authority to accept such assignment and to agree to make such payments, and that such agency shall accept such assignment and shall so agree. As capacity is so absorbed by the Company or as and when any such assignment shall become effective, Contract Capacity shall be correspondingly reduced.

SECTION 7.04. *Credit to AEC After Termination Upon Relinquishment by AEC of Capacity:* If the AEC shall deliver to the Company a statement in writing that it relinquishes its right to the Contract Capacity or any portion thereof as to which a notice of termination shall have been delivered to the Company pursuant to Section 7.02, the AEC shall receive a credit of $500,000 for each one-third of Contract Capacity (determined as provided in Section 1.04 but without any reduction therein as provided in Sections 7.02 and 7.03 and paragraph 3 of Section 7.07) so relinquished, in computing the annual Capacity Charge payable by the AEC; *provided however,* that if the Company shall absorb pursuant to any of the provisions hereof any portion of the capacity so relinquished, such credit shall be decreased in proportion to such absorption at the same time that the annual Capacity Charge is reduced pursuant to Sections 4.10 and 7.02 in connection with such absorption.

SECTION 7.05. *Notice by Company Regarding Absorption of Power:* Not less than 24 months prior to the effective date of any notice of termination delivered to the Company pursuant to Section 7.02, the Company will deliver to the AEC a written statement of the amount of Contract Capacity, not less than the minimum provided for in Section 7.03, which the Company will absorb as of the beginning of the first twelve-month period following the effective date of termination. Thereafter, not less than 24 months prior to the commencement of each succeeding twelve-month period following the effective date of such termination, the Company will deliver to the AEC a similar statement in writing with respect to such period, until all terminated capacity shall be accounted for. Failure by the Company to deliver any such 24-months' notice except the last shall be tantamount to a notice by the Company that it will absorb 100,000 kilowatts of capacity as of the beginning of the twelve-month period to which such notice would have applied, and failure by the Company to deliver the last such notice shall be tantamount to a notice that it will absorb the balance of terminated capacity at the beginning of the twelve-month period to which such notice would have applied. By mutual agreement of the parties the 24 months required for notices under this Section may be shortened, and by similar agreement notices under this Section may be made to apply to periods other than the twelve-month periods specified above.

Section 7.06. *Reimbursement of Company for Costs and Expenses upon Termination:* On and after any termination pursuant to Section 7.02, the Company shall have the right, in addition to any other rights hereinbefore specified, to collect from the AEC, and the AEC shall be obligated to pay to the Company, cancellation costs equivalent to any fair and reasonable cancellation charges which the Company may have to pay to third persons as a result of such termination and all other costs and expenses suffered or reasonably incurred by the Company by reason of such termination. The Company will exercise every reasonable effort to reduce such cancellation charges and other costs and expenses to a minimum by, among other things, continuing contracts which the Company may have to such extent as may be consistent with the requirements of the Facilities following such termination, and making arrangements with companies in the systems of the Sponsoring Companies or with the AEC to take over such contracts where such action is practicable and may be carried out with no economic or other disadvantage.

Section 7.07. *Cancellation Prior to Completion:*

1. If, prior to the commencement of commercial operation of the third unit of the Facilities, the power requirements of the AEC at the Projects are so reduced that it will no longer require service hereunder, the AEC may assign to TVA the right to power and energy hereunder in accordance with the terms hereof. Acceptance of such assignment by TVA and notice thereof to the Company by the AEC shall have the effect of the delivery of a notice of termination by the AEC at the earliest date possible under Section 7.02. If the AEC advises TVA that such assignment to it is available and ascertains that TVA has concluded that it does not need the power hereunder during the period which such assignment would cover, the AEC shall be entitled to cancel this contract by delivering a written notice of cancellation to the Company, and such notice shall have the effect set forth in paragraph 2 or paragraph 3 of this Section, whichever is applicable.

2. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company prior to the time when the Company shall have incurred expenditures on account of the cost of the Facilities as referred to in Section 4.02 which, together with the costs (estimated

where necessary) of cancellation of commitments made in that connection, shall equal \$40,000,000, this contract shall terminate on such date after the delivery of such notice as shall be specified therein. In such event, the AEC shall pay to the Company as cancellation costs such amount or amounts that there shall be available for distribution to the Sponsoring Companies net assets, including at cost to the Company land acquired for the site of the Facilities, equivalent to the investment of the Sponsoring Companies in the equity of the Company up to the effective date of such cancellation, after payment and satisfaction of all reasonable liabilities, costs, indebtedness, cancellation or revocation costs and damages, and all other reasonable costs, expenses, charges and losses resulting from such cancellation, including carrying charges on indebtedness of the Company to the earliest practicable date for the retirement thereof after the receipt of payment by the AEC under this paragraph, together with any premium payable upon the redemption of such indebtedness; and the AEC shall be entitled to, and shall remove from the site of the Facilities at its own cost and expense and within a reasonable time, all items of personal property theretofore acquired by the Company and not returned or returnable to a vendor in connection with the cancellation or revocation of a contract or commitment, and may remove from the site of the Facilities at its own cost and expense and within a reasonable time all items of property acquired by the Company which have been so attached to the land or any structure thereon as to become realty, provided any injury to the land caused by such removal shall be made good. The AEC shall have the right, in lieu of reimbursing the Company for cancellation charges or payments on any purchase contract or order, to take over such purchase contract or order upon the agreement by the AEC to assume all liabilities thereunder and hold the Company harmless therefrom. The AEC shall make payment of amounts payable hereunder from time to time and as soon as practicable to the end that the aggregate amounts payable by it hereunder shall be reduced so far as possible and the Company will undertake to cooperate with the AEC for that purpose.

3. If a notice referred to in paragraph 1 of this Section shall be delivered to the Company after the time referred to in the first sentence of paragraph 2 of this Section, such notice shall be deemed to constitute a notice of termination under Section 7.02 and termination shall become

effective pursuant thereto three years after the earliest date when a notice is deliverable pursuant to the provisions of Section 7.02, but immediately upon delivery of such notice referred to in paragraph 1 of this Section, the Company shall be obligated to start absorbing capacity as rapidly as the growth of its load will permit. To the extent it can so absorb capacity, it will agree with the AEC on the amounts and dates of such absorption, and Preliminary Contract Capacity or Contract Capacity, as the case may be, shall be reduced on such dates and in amounts corresponding to the respective amounts so absorbed. In this connection the Company shall have the right to elect, at the time of any such absorption, to treat the capacity then absorbed, to the extent that it will suffice, as an anticipated fulfillment of the minimum obligations of the Company to absorb Contract Capacity on an annual basis under Section 7.03.

SECTION 7.08. *Service After Contract Term:* If the AEC shall require electric utility service for its operations at one or more Projects after the term of this contract, and if it shall then have lawful authority to contract for such service, it shall have a first call on the capacity of the Facilities for an additional term of five years in any amount up to but not exceeding the Contract Capacity in effect at the end of such term, upon giving the Company at least three years' written notice prior to the end of such term of the amount of the AEC's requirements. The power and energy taken during such five-year period will be paid for by the AEC on the terms and at the prices provided for in this contract, adjusted to give credit and recognition to the condition of the Facilities, any change in the rate of depreciation, any changed requirements for replacements and reserve capacity, availability of such reserve capacity, interest and amortization on debt necessary to provide such service, plus a fair return on any equity capital reasonably required in order to provide such service during such extended period. If the AEC exercises the above option to purchase power for such additional term of five years, the AEC, upon like notice and under like conditions, shall have a first call for a further period of fifteen years or any part thereof on the capacity of the Facilities in any amount not exceeding the amount to which the AEC shall be entitled at the expiration of the initial five-year extension. The terms of any

agreement relating to such further period shall give effect to mutually satisfactory arrangements determined after a separate review of the factors hereinbefore described, the experience of the parties hereto during the initial five-year extension, and the reduction or elimination of interest and amortization requirements on the long-term debt of the Company.

SECTION 7.09. *Recapture:* At any time within three years after the effective date of this contract the AEC shall have the option to purchase the Facilities, including all property contracted for or acquired for inclusion therein, upon giving the Company thirty days written notice of the intention of the AEC to exercise the privilege of purchase provided for in this Section. On the last day of such thirty-day notice period or on such other date as shall be mutually agreed upon, the Company will transfer to the AEC all right, title and interest of the Company in and to all property, real, personal or mixed, included in the Facilities or contracted for or acquired for inclusion therein, and the contracts therefor, and the AEC shall assume all liabilities then outstanding of every kind or nature theretofore incurred by the Company in connection with the acquisition or construction of the Facilities, including liabilities relating to debt securities of the Company, and shall indemnify the Company against all such liabilities. The Company will segregate in separate accounts the proceeds of issuance of its debt securities, will utilize such proceeds only for expenditures made on account of the cost of the Facilities, and upon such transfer to the AEC will assign to the AEC all the right, title and interest of the Company in and to the amounts in such separate accounts. The AEC shall pay to the Company in cash an amount equivalent to the sum of (a) aggregate expenditures theretofore made on account of the cost of the Facilities as referred to in Section 4.02, including expenditures for property contracted for or acquired for inclusion in the Facilities, as of the date of transfer thereof to the AEC, (b) an amount equivalent to the unexpended balance, as of such date of transfer, of the proceeds from the issue of debt securities, including the amount of any cash on deposit with the trustee under any indenture or deed of trust of the Company, and (c) an amount equivalent to all costs and commitments incurred by the Arkansas Power & Light Company in connection with

constructing the facilities for backup supply referred to in Item IV of Appendix C hereof, ~~including~~ cost, if any, required for reconverting the facilities to their original condition, less ~~any then~~ value, salvage or otherwise, to Arkansas Power & Light Company by reason of costs and commitments incurred, in the light of the use to which such facilities in their then state of completion may be put in the absence of this contract, less (d) an amount equivalent to the principal amount of debt securities of the Company assumed by the AEC and outstanding on such date of transfer to the AEC. The amount of such cash payment shall be determined as promptly as practicable in accordance with Section 4.02 and upon such determination shall be paid to the Company by the AEC, together with interest thereon at the rate of 6% per annum from the date of transfer of the Facilities to the AEC to the date of payment. For purposes of this Section the AEC may designate any other agency of the United States Government thereunto duly authorized to accept such transfer, make such payment, assume such indebtedness and indemnify the Company.

ARTICLE VIII.

General Provisions.

Section 8.01. *Purchase of Fuel:* The Company shall afford the AEC the opportunity to review and discuss the price, terms and conditions of any major long-term contract proposed to be made by the Company with any supplier of coal or other fuel to be furnished to the Company for consumption at the Facilities and any major long-term contract to be made by the Company for the handling and shipment of coal or other fuel, and to make recommendations with respect to any such contract looking toward economies and dependability in the fuel supply; *provided however,* that the acquiring of an adequate, dependable and economical fuel supply shall be the responsibility of the Company. In addition, with respect to any such contract proposed to be made by the Company for a term exceeding one year, the AEC shall have the right, prior to the making of such contract, to approve the cancellation provisions thereof. If the AEC shall be in a position to purchase and deliver, or cause to be delivered, to the Facilities fuel at a cost lower than the cost to the Company for fuel of like grade

7

and quality so delivered, the AEC shall have the right to supply such fuel to the Company, either by sale or otherwise, on such terms as shall be mutually agreeable to the parties.

Section 8.02. *Use of Fuels or Sources of Energy Other than Coal:* The Company may make use of fuels or sources of energy other than coal, if available, to the extent that it is economically advantageous to do so. If the Company decides to make use of another fuel or source of energy, the parties will review the economies to be effected thereby, as well as the considerations mentioned in Section 4.12, and the parties hereto will enter into appropriate amendments to this contract to make any equitable over-all downward adjustment to which they may mutually agree.

Section 8.03. *Accounts:*

1. The Company shall keep books of account in accordance with the Uniform System of Accounts and such other systems of accounts prescribed by other Governmental regulatory authorities having jurisdiction as may be applicable, shall keep such records and memorandum accounts as may be required for the computation of amounts payable by the AEC hereunder and shall furnish such information and reports therefrom as the AEC may reasonably require. The Uniform System of Accounts shall be used for the determination of any question relative to costs and expenses arising under this contract except that where specific methods of computations of amounts are set forth in this contract such methods shall be employed in lieu of any other method which might be required by the Uniform System of Accounts.

2. The AEC shall have the right, at such reasonable times as it deems appropriate until five years after termination or expiration of this contract, to inspect all books, records, accounts and related documents involving transactions relating to this contract, including those relating to the Facilities, and to make such audits thereof as the AEC may deem necessary to protect its interests. Such books, records, accounts and all related documents will be retained by the Company in accordance with Federal Power Commission Regulations to Govern the Preservation of Records of Public Utilities and Licensees as in effect at the date hereof.

3. The Company agrees that the Comptroller General of the United States or any of his duly authorized representatives, until the expiration of three years after final payment under this contract, shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Company involving transactions related to this contract.

4. The Company further agrees to include in each subcontract hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States, the AEC or any of their duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers and records of such subcontractor involving transactions related to the subcontract. The term "subcontract" means any purchase order or agreement to perform all or any part of the work or to make or furnish any materials required for the performance of this contract, but does not include (i) purchase orders not exceeding $1,000, (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public, or (iii) subcontracts or purchase orders for general inventory items not specifically identifiable with the work under this contract.

5. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

Section 8.04. *Successors and Assigns:* This contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This contract, however, may not be assigned by either party without the written consent of the other, except that (a) the AEC may assign this contract without consent of the Company to any agency of the United States of America which is a successor to the AEC for purposes of operation of one or more Projects, if such successor agency is authorized to assume and does assume all the duties and obligations of the AEC hereunder, (b) the Company may assign this contract without consent of the AEC to a successor to all or substantially all the property and assets of the Company, (c) the Company may pledge this contract without consent of the AEC to secure indebtedness of the Company incurred or to be incurred for the purpose of

constructing the Facilities, and (d) in connection with the enforcement of any such pledge, this contract may be assigned or transferred without consent of the AEC to one or more persons who shall assume the obligations of the Company hereunder. Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended, the Company, without the consent of the AEC, may assign to any bank, trust company or other financing institution, including any federal lending agency, any moneys due or to become due under this contract, and any such assignment may cover all or any part of the amounts payable by the AEC to the Company hereunder and may be made to more than one such bank, trust company or financing institution either for their own respective accounts or as agent or trustee for two or more parties who are holders of evidences of indebtedness of the Company. Payments to be made to the assignee of any moneys due or to become due under this contract shall not be subject to reduction or set-off other than for amounts due the AEC or the Government under this contract.

SECTION 8.05. *Force Majeure:* The Company shall not be held responsible or liable for any loss or damage to the AEC on account of non-delivery of power or energy hereunder at any time due to any cause beyond the control of the Company, including but not limited to an act of God, fire, flood, explosion, strike, sabotage, an act of the public enemy, civil or military authority, insurrection or riot, an act of the elements, failure of equipment, or inability to obtain or ship materials or equipment because of the effect of similar causes on suppliers or carriers; *provided however,* that non-delivery on account of any such causes shall not relieve the AEC from its obligation to pay the Company any charges payable hereunder except to the extent that such charges may include payments for which the Company is compensated by insurance or otherwise or of which the Company is relieved as the result of the operation of such causes and which are not offset by losses, costs, expenses or liabilities arising from or in connection with such causes and not covered by or included in payments under this contract. The Company will exert every effort to assure the continuity of supply of the Contract Capacity, and when that amount of power is not available because of the foregoing causes, the Company will endeavor, upon request of the AEC, to secure the necessary power from others at rates as specified in Section 3.01.

Section 8.06. *Effect of Changes in Certain Laws or of Hostilities:* In the event that new laws or amendments to existing laws shall be enacted or new orders or amendments to existing orders shall be issued or new regulations or amendments to existing regulations shall be promulgated by governmental authorities having jurisdiction affecting wage rates, hours of work, or other conditions, or in the event of active hostilities, whether or not accompanied by a formal declaration of war, any of which shall result in increased or decreased costs hereunder, the parties hereto will enter into appropriate amendments of this contract designed to protect each party against impairment of its rights hereunder by reason of such increased or decreased costs.

Section 8.07. *Property Insurance:* The Company will cause its property which is of a character usually insured by companies similarly situated and operating like properties to be insured to a reasonable amount against loss or damage from such hazards or risks as are usually insured by such companies or as may be required by any mortgage or other instrument pursuant to which indebtedness of the Company shall have been issued or incurred. The proceeds of any such insurance received by the Company due to the destruction of or damage to the Facilities shall be applied to the replacement, restoration or repair thereof to the condition required to fulfill the Company's obligations under this contract. From time to time upon written request of the AEC, the Company will furnish it with a statement of such insurance outstanding and in force, including the names of insurance companies which have insured, the amounts of insurance, and the property, hazards and risks covered thereby.

Section 8.08. *Patents and Inventions:* The Company agrees to indemnify the Government, its officers, agents and employees against liability of any kind, including costs and expenses incurred, for the use of any invention or discovery or for the infringement of any Letters Patent (not including liability arising pursuant to 35 U. S. Code, Section 183, as amended, prior to the issuance of Letters Patent) occurring by reason of the installation or use by the Company, or the installation by the AEC for the account of the Company, of items manufactured, furnished, installed or supplied under this contract. Any liability or loss of the kind described in this Section suffered by

the Company shall not be included directly or indirectly in the determination of any charges to the AEC.

SECTION 8.09. *Interests of Others:* No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit which may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

SECTION 8.10. *Restriction on Employment:* In the performance of its obligations hereunder, the Company shall not employ any person undergoing sentence of imprisonment at hard labor.

SECTION 8.11. *Anti-Discrimination:* In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay, or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees or applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause. The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

SECTION 8.12. *Disclosure of Information:*

1. It is understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted matter that may come to the Company or any person under its control in connection with the work under this contract, may subject the Company, its agent, employees, and subcontractors to criminal liability under the laws of the United States. See the Atomic Energy Act of 1954.

2. In the performance of work under this contract the Company agrees to conform to all security regulations and requirements of the AEC. Except as the AEC may authorize in accordance with the Atomic Energy Act of 1954, the Company shall not permit any individual to have access to restricted data until the designated investigating agency shall have made an investigation and report to the AEC on the character, associations, and loyalty of such individual and the AEC shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. As used in this paragraph the term "designated investigating agency" means the United States Civil Service Commission or the Federal Bureau of Investigation, or both, as determined pursuant to the provisions of the Atomic Energy Act of 1954.

3. Except as approved in writing by the AEC, the Company shall insert the provisions of paragraphs 1 and 2 of this Section in all subcontracts, agreements with its employees, agreements for borrowed personnel, and the contract or contracts with the Sponsoring Companies referred to in Section 2.02.

SECTION 8.13. *Eight-Hour Law:* This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (Title 40 U. S. Code, Sections 324-326), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said law.

No laborer or mechanic doing any part of the work contemplated by this contract in the employ of the Company or any subcontractor contracting for any part of said work, shall be required or permitted to work more than 8 hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Section The wages of every laborer and mechanic employed by the Company or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of 8 hours per day and work in excess of 8 hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of 8 hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of

this Section, a penalty of $5 shall be imposed upon the Company for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work without receiving compensation computed in accordance with this Section, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

Section 8.14. *Selection of Employees:* The Company shall make every reasonable effort in the selection of its employees to secure persons who are competent, careful, honest and loyal to the United States of America.

Section 8.15. *Regulatory Approvals and Indebtedness:* The obligations of the parties hereunder shall be subject to the following:

(1) the receipt of all regulatory approvals, in form and substance satisfactory to the Company, necessary to permit the Company to perform all the duties and obligations to be performed by it hereunder or necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to issue the indebtedness referred to herein;

(2) the execution and performance by institutional investors and banks of contracts or commitments, in form and substance satisfactory to the Company, providing for the issuance by the Company and the purchase by such investors and banks of the indebtedness referred to in the recitals of this contract;

(3) the receipt by the Company of an opinion of the General Counsel to the AEC to the effect that the AEC has power and authority to execute this contract and the undertakings herein described and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the persons executing and delivering this contract on behalf of the AEC have full power and authority to do so; and

(4) the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC

has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress.

SECTION 8.16. *Representation and Warranty and Agreements of the Company:*

1. The Company represents and warrants that, subject to the approval of regulatory authorities having jurisdiction, it has entered into a valid and binding contract with the Sponsoring Companies wherein the Sponsoring Companies have agreed to subscribe to and purchase for cash capital stock of the Company as follows: Middle South Utilities, Inc. $4,345,000; The Southern Company $1,155,000.

2. The Company agrees that it will not modify or change the contract or contracts referred to in Section 2.02 so as to alter the effect thereof as described in that Section, and will not modify, change or rescind the stock subscription agreement referred to in paragraph 1 of this Section.

3. The Company will not request accelerated amortization of the Facilities for income tax purposes, of the character provided by the Defense Production Act of 1950, as amended, unless it has obtained the written consent of the AEC and the parties have entered into an appropriate amendment to this contract to make an equitable adjustment of the provisions hereof.

SECTION 8.17. *Effect of Invalidity of any Provisions Hereof:* If any of the provisions of this contract, or any part of any provision hereof, shall be held to be illegal for any reason, the other provisions hereof, and the other parts of the provision containing such illegal part, shall not be affected thereby, and shall continue in all respects valid and enforcible. In such event the parties will make such amendments hereto, as may be mutually agreed upon, to the end that the objectives of this contract shall be accomplished as nearly as practicable in a lawful manner. If the provision or part thereof so held to be illegal

shall be one providing for any payment, or any component of any payment, by the AEC to the Company or be one by which any such payment, or any component thereof, is determined and the parties shall fail within three months after such holding (or such longer or shorter period on which the parties shall agree) to agree to amendments to this contract which shall have the effect of restoring the Company, in a lawful and practicable manner, to substantially the earnings position the Company would have had except for such illegality, then the Company shall have the right, to be exercised by written notice delivered to the AEC within one year following the end of the period for amendment determined as above provided, to elect, effective as of a date to be specified in the notice, which date shall be not less than one month following the date of such notice, to cancel and make ineffective thereafter all the provisions of Article IV of this contract but to continue to furnish capacity and energy to the AEC as herein provided at such just and reasonable rates, which shall contain both a capacity charge and an energy charge, as may be from time to time fixed or approved by the Federal Power Commission acting in a regulatory capacity under the standards provided by the Federal Power Act, or by such other regulatory commission as shall have jurisdiction; and thereupon the AEC, from and after the date when payments cease to be made in accordance with the provisions of this contract, shall be obligated to take and pay for capacity and energy furnished hereunder at not less than the rates so fixed or approved. Prior to such effective date, the Company will file with such commission a schedule of the capacity charge and the energy charge the Company proposes for the capacity and energy supplied hereunder. Pending the initial date of approval or determination by such commission of the rates so to be payable hereunder, the AEC, effective as of the time when payments ceased under this contract and monthly thereafter, shall pay to the Company in accordance with the capacity charge and energy charge proposed by the Company, subject to appropriate adjustment by refund or additional payment, as the case may be, after the determination or approval by such commission of the just and reasonable rates to be payable to the Company. Until such determination or approval, the Company shall retain, and impound in a separate fund, the payments so received by the Company except to the extent necessary for its operations and for the current payment of its liabilities and obligations,

including amortization of debt. Any action by such commission for the purposes of this provision shall be subject to the same rules and rights as to review in the courts as are applicable by law to other proceedings before such commission. If the AEC shall, after such a cancellation of the provisions of Article IV hereof as hereinabove provided, terminate this contract in whole or part pursuant to the provisions of Section 7.02 or 7.07, then the capacity charge in the rates fixed or approved as herein provided shall be taken as the Capacity Charge to be paid or reduced under the provisions of Sections 7.02 and 7.03.

SECTION 8.18. *Covenant Against Contingent Fees:* The Company warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Company for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

SECTION 8.19. *Notices:* All notices under this contract shall be in writing, and if to the Company, shall be sufficient in all respects if delivered in person to its President or Vice President, or sent by registered mail addressed to it at P. O. Box 1376, West Memphis, Arkansas, or at any subsequent address of which the Company may notify the AEC in writing; and if to the AEC, shall be sufficient in all respects if delivered in person to Manager, Oak Ridge Operations, Atomic Energy Commission, or sent by registered mail addressed to the AEC at P. O. Box E, Oak Ridge, Tennessee, or any subsequent address of which the AEC may notify the Company in writing.

SECTION 8.20. *Titles of Articles and Sections:* The titles of the Articles and Sections in this contract have been inserted as a matter of convenience of reference and are not a part of this contract.

Section 8.21. *This Writing Constitutes the Agreement:* This contract constitutes the entire agreement between the parties and supersedes all prior communications or statements of the parties, whether written or oral, with respect to agreement as to the subject matter hereof.

Section 8.22. *Effective Date:* The effective date of this contract shall be the latest of the following: (a) the date when this contract is executed and delivered by the parties hereto; (b) the date when item (3) of Section 8.15 shall be delivered to the Company; (c) the date when item (4) of Section 8.15 shall be delivered to the Company; or (d) the date on which the time shall have elapsed during which the contract must remain on file with the Joint Committee on Atomic Energy pursuant to Section 164 of the Atomic Energy Act of 1954 or the date when said Joint Committee shall have waived such requirement as provided in said Section.

Section 8.23. *Arbitration:* In the event the parties hereto are unable to reach an agreement as to any matter which it is contemplated shall be settled by agreement, negotiation or amendment between the parties under Sections 1.04, 3.01, 4.02, 4.03, 4.06, 4.09, 4.11, 4.12, 4.13, 4.14, 4.15, 7.08, 7.09, 8.02 or 8.06 hereof, then the determination of such matter shall be made by arbitrators appointed as hereinafter provided. If with respect to any such matter the parties shall have failed to reach an agreement within a period of three months after the date when such matter first arose for determination, or within such longer or shorter period as the parties hereto may agree, then either party may by written notice to the other appoint an arbitrator to act hereunder with respect to the determination of such matter. Within fifteen days from receipt of such notice of appointment of an arbitrator the other party shall appoint an arbitrator and give written notice of such appointment to the first party. The arbitrators so appointed shall within a period of forty-five days after the date of appointment of the second arbitrator agree upon the appointment of a third arbitrator who shall be a person engaged in engineering work or business relating to the production or transmission of electric power

Modified Suppleme

and energy. Should the arbitrators appointed by the parties be unable to agree upon the selection of a third arbitrator, or should there for any other reason be a failure to appoint three arbitrators as contemplated by this Section, either party may apply to any federal court which would have jurisdiction of an action between the parties arising out of this contract for the appointment of an arbitrator or arbitrators, pursuant to Section 5 of the Federal Arbitration Act (Title 9 U. S. Code, Section 5). The compensation and expenses of the arbitrators in connection with the performance of their duties hereunder shall be paid in equal proportions by each of the parties hereto unless the arbitrators otherwise specify in their decision. Promptly after the selection of the third arbitrator, as above provided, the arbitrators shall proceed, in accordance with such procedure as they may fix, to hear and determine the matter for the determination of which they have been appointed. The arbitrators shall thereupon and as promptly as feasible, determine such matter by a written decision, a copy of which is to be delivered to each of the parties hereto, to be made in accordance with any applicable standards relating to such matter contained herein and to include a finding that such decision is consistent with the provisions hereof and, in any case where such decision is to be made the basis of an amendment to the contract, findings that such decision is desirable in the business of the Company and the AEC, is not prejudicial to the interests of the holders of the outstanding indebtedness of the Company and will not impair any security therefor. The decision of two or more of the arbitrators shall be final and binding upon the parties hereto. If under the provisions hereof the matter so determined by a decision of the arbitrators requires an amendment or amendments hereto, the parties agree to incorporate such decision in an appropriate amendment or amendments hereto, in such form and manner as the arbitrators shall designate if the same cannot be agreed upon by the parties hereto, and to execute an appropriate instrument setting forth such amendment or amendments. Either party may at any time apply to an appropriate court for entry of judgment upon a final award of the arbitrators. If at any time or with respect to any matter the provisions of this Section shall be unenforceable for any reason as to either of the parties hereto and

the parties shall not at such time comply with the provisions of this Section, then they shall take such other action as may be at the time mutually agreed upon to secure a determination of the unsettled matter.

In Witness Whereof, the parties hereto have caused this instrument to be executed as of the day and year first above written.

Mississippi Valley Generating Company,

[Seal]

By E. H. Dixon
President

Attest:

H. F. Sanders
Secretary

The United States of America,
By and Through the Atomic Energy Commission,

By R. W. Cook

R. W. Cook,
Acting Assistant General Manager for Manufacturing

Attest:

Approved

K. D. Nichols

K. D. Nichols,
General Manager,
Atomic Energy Commission.

November 11, 1954.

APPENDIX A.

Description of Properties.

A. General.

Mississippi Valley Generating Company is acquiring a site in Crittenden County, Arkansas, and will construct thereon a steam-electric generating station and a transmission substation (these two facilities being hereinafter sometimes referred to as the "Mississippi River Steam Electric Station").

Mississippi Valley Generating Company proposes to acquire rights-of-way in Arkansas and to construct thereon transmission lines from the Mississippi River Steam Electric Station to terminal points at the middle of the Mississippi River in the Memphis area, for the purpose of delivering electric energy to the Tennessee Valley Authority for the Atomic Energy Commission as provided in the accompanying contract.

The location of the Mississippi River Steam Electric Station is shown on the map which is part of this Appendix A. A supplemental map will be issued when transmission details are settled.

B. Steam-Electric Generating Station.

1. *General Features.*

The steam-electric station constituting the production element of this project will be of the outdoor type, located on the site referred to above on the west bank of the Mississippi River approximately two miles south of West Memphis, Arkansas.

General facilities to be provided will be those necessary for the development of the new site, comprising: site improvements, including protective levee; roadways; railroad trackage for delivery of equipment and material; dock facilities for unloading coal from river barges; coal and ash handling facilities; fire protection system; service-water installation; sanitary facilities; administration building, warehouses, equipment repair shop and other miscellaneous buildings.

2. *Arrangement and Structures.*

Three turbine-generators will be placed on an open deck at approximately elevation 245 (referred to mean sea level), served by one 60-ton

overhead gantry crane. Boiler equipment will be located upstream or north of the turbines, main operating floor being at approximately elevation 245. Grade is at approximately elevation 212. Top of stack will be at an approximate elevation of 462.

There will be provided, on the operating floor level between boiler Units No. 1 and No. 2, an enclosed control room, air-conditioned and acoustically treated. In this room will be located all operating controls for the three turbine-generating units, the three steam generating units and their accessories, and complete controls for all transmission facilities.

The intake for circulating water for the three condensers will be at the river bank, with the water pumped therefrom to the station through concrete pressure pipe. Discharge seal well is located south of the intake structure with water carried to it from the condenser discharge through concrete pressure pipe.

3. *Equipment.*

Each of the three turbine-generators will be capable of a maximum continuous gross output of approximately 234,000 kw with throttle steam conditions of 2,000 pounds per square inch gage pressure and 1,050 degrees Fahrenheit primary superheat temperature and reheat to 1,000 degrees Fahrenheit, at a back pressure of approximately 3 inches of mercury absolute with seven stages of extraction for feedwater heating and nominal makeup. Generators wound for 18 or ... kv will have a maximum continuous nameplate rating of 310,000 kva, 0.77 power factor, short circuit ratio of approximately 0.58 at maximum coolant pressure. Each unit will be served by a separate motor-driven exciter.

River-water temperature varies between a minimum near 45 F and a maximum of approximately 90 F which will give a usual range of condenser back pressures of from less than 1 inch to approximately 3 inches. Expected gross maximum generation of each plant unit at generator voltage is expected to be 234,000 kw with approximately three inches back pressure. Allowing for station uses and transformer losses, the net capability which can be continuously generated is expected to be approximately 650,000 kw, under conditions in which all normally operated equipment is in service, equipment is in an average state of maintenance and cleanliness, with the fuel consumed being of

the average quality purchased, with normal steam conditions and normal interstage extraction from the turbines, with generators operating with usual coolant pressure and at normal voltage and power factor and with circulating water temperature and cleanliness normal for midsummer.

The surface condenser serving each turbine will have about 110,000 square feet of surface, being of the two-pass divided-water-box type. Circulating water for each condenser will be supplied by two pumps at intake.

Steam generating plant will consist of three units, each of which is designed to deliver continuously about 1,550,000 pounds per hour of steam when fired with 10,000-Btu-per-lb. coal, carrying 15 per cent moisture and 15 per cent ash as received. Each steam generating unit will be equipped with necessary coal preparation and burning equipment. Each steam generating unit will be provided with dust collecting apparatus.

The mechanical and electrical auxiliaries and accessories will be those normal for the plant and with tolerances adequate to assure the net capability of the plant.

C. SUBSTATION.

Each generating unit will be connected to a 161 kv (nominal) switchyard through a bank of step-up transformers. One three-phase unit auxiliary transformer will be tapped off each generator main lead circuit to furnish power for the unit boiler, turbine and plant auxiliaries. A starting transformer shall be provided.

Also connected to the switchyard will be the transmission lines to the Primary Delivery Points and to the system of Arkansas Power & Light Company.

D. TRANSMISSION LINES.

The exact number and location of 161 kv (nominal) lines to the middle of the Mississippi River and necessary line terminal positions, circuit breakers, system relay protection, communications and telemetering and control equipment, will be determined by mutual agreement among the AEC, the Company and TVA.

APPENDIX B.

Delivery Points and Method of Energy Accounting.

I. Primary Delivery Points.

The Facilities of Company will be electrically connected to the TVA system at the middle of the Mississippi River near Memphis, Tennessee. These connections will consist of circuits of sufficient capacity to deliver the Contract Capacity over and above present capacity of present river crossings, with the exact number and location of the Primary Delivery Points to be mutually agreed upon by the AEC, the Company, and TVA. Even though substantially all the Contract Capacity and scheduled energy flows between the Company and AEC will flow over such Primary Delivery Points, it will be necessary to take into account such minor amounts of power flow that may occur over other indirect routes.

There will be sufficient transmission capacity between the systems of the Sponsoring Companies and the Company to permit the delivery by the Company of the Contract Capacity at the Primary Delivery Points with one unit out of service; however, in actual operation some of the power flow may be over other indirect routes.

II. Secondary Delivery Points.

Secondary Delivery Points will be those points of connection to the TVA system, now established or established at any future time during which deliveries under this contract are made, which complete an electrical path between the Facilities of Company and the TVA system other than through the Primary Delivery Points.

The Facilities of the Company are to be connected to the transmission system of Arkansas Power & Light Company, a subsidiary of Middle South Utilities, Inc. The transmission system of Arkansas Power & Light Company is connected to the transmission systems of Louisiana Power & Light Company and Mississippi Power & Light Company, both of which are also subsidiaries of Middle South Utilities, Inc.

The transmission systems of Louisiana Power & Light Company and Mississippi Power & Light Company are or may be connected to the transmission system of Mississippi Power Company, a subsidiary of The Southern Company.

The transmission system of Mississippi Power Company is connected, directly or indirectly, to the transmission systems of Alabama Power Company, Georgia Power Company and Gulf Power Company, all of which are subsidiaries of The Southern Company.

The transmission systems of Mississippi Power & Light Company, Alabama Power Company and Georgia Power Company are connected to the transmission system of TVA by major transmission lines at seven points. Each of these points is a Secondary Delivery Point under this contract.

Furthermore, the transmission systems of subsidiaries of The Southern Company are or may be connected ~~directly~~ or indirectly with the transmission systems of other utilities in the southeastern part of the United States which in turn are or may be interconnected directly or through other systems with the TVA system. Also the transmission system of Arkansas Power & Light Company is or may be connected with other transmission systems which in turn are or may be connected directly or through other systems with the TVA system.

All such points of connection to the transmission system of TVA from adjacent interconnected transmission systems, which can complete a parallel connection with the Facilities of Company, are Secondary Delivery Points under this agreement.

III. Method of Accounting for Energy Deliveries and Billing Therefor.

Methods of operation and accounting for interchange transactions along the lines outlined below are used in a number of areas in the United States where there are power pools or interconnected groups of electric utility systems with multiple interconnections. The principles are being used for transactions between TVA, Middle South and Southern Company systems. Such a method of operation and accounting is necessary because it is impractical to attempt to control the flow of power over individual interconnections in such networks. The method which shall be used for accounting for energy deliveries under this contract is expected to be approximately as outlined below but shall be agreed upon in detail among the Company, the AEC and TVA.

1. AEC will schedule its requirements from Company within the contract limits, on an hour by hour basis. Such schedules

will be submitted, as may be mutually agreed upon, from a week to a month in advance. In the event that unusual conditions cause AEC to wish to change the schedule quickly, AEC may instruct the Company by telephone to change the schedule, within the limits of the contract and within the operating limitations of the generating equipment.

2. Middle South and Southern Company system operators will, upon receipt of the AEC schedule, schedule the amounts of power hour by hour that the Middle South and Southern Company systems will deliver or receive to or from the Company. From the three schedules, a schedule of net generation for the Company is to be made and that schedule, with whatever emergency amendments may be required, is the obligation of the Company. Energy billed between the Company and all parties contracting with it is to be based on the final schedules.

3. Each individual system of the interconnected group has telemetering equipment which gives its dispatchers information on the net flow into or out of such system. As each such system has an hour by hour schedule of its transactions with the outside systems, it is able to prepare a net schedule of flow into or out of its system for comparison with the telemetered readings of actual flow. It is then the obligation of each such system to adjust its own generation to hold the net actual flow equal to the net scheduled amount each hour as closely as practicable. Any deviation between a system's net scheduled interchange and net actual interchange is compensated for by an adjustment to its generation in the next succeeding hour, in order to minimize the cumulative deviation.

4. The meters at each point of interconnection are read periodically and a balance sheet drawn up for each system for the period. The balance sheet shows definitely whether or not each system received or delivered the amount of energy scheduled and which systems are responsible for any deviations from the total obligations for such period. Any

such deviations appearing on the balance sheet for the period are corrected during the following period by compensating adjustments to generation. All energy information is recorded on log sheets hour by hour and is available for analysis and rectification of deliveries or billings, if proper, at any subsequent date.

5. Where two or more operating utilities are interconnected and operated as one integrated system, the reference to "party," "system," or "systems" herein applies to such integrated system and not to the individual companies.

APPENDIX C

I. Components of Cost Included in Base Capacity Charge—Section 4.01

A. *Cost of Money:*

1. Debt (30-year Level-Payment Sinking Fund Bonds—3½% Interest)	$101,750,000 x 5.437%	$5,532,000	
2. Equity	$ 5,500,000 x 9%	495,000	
3. Total	$107,250,000		$6,027,000

B. *Replacement Payments:*

1. For facilities to be constructed by associated company	$ 1,135,000 x 0.25%		2,800

C. *Operating Expenses* (excludes variable component of Maintenance included in energy charge—Section 4.04):

1. Operating Labor	700,000	
2. Maintenance and Miscellaneous (excludes variable component of Maintenance)	600,000	
3. No Load Fuel	800,000	
4. Transmission Operation and Maintenance	40,000	
5. Power Department Expense	20,000	
6. Insurance ($104,790,000 x 0.168%)	176,000	
7. Administrative and General	150,000	
8. Total		2,486,000

D. *Federal Income Tax Cost—52% Rate:*

$495,000 ÷ .48 = $1,031,250 — $495,000	536,250
E. Total	$9,052,050

II. Components of Cost Included in Base Energy Charge—Section 4.04:

A. *Cost of Fuel (unloaded) Component:*

9,017 Btu per kwh @ 19¢ per mBtu fuel	1.713 mills
Variable maintenance and operating supplies (includes labor and material) component per kwh	.150
Total	1.863 mills

III. Reserve for Deferred Maintenance will be determined on the following basis:

The Reserve shall be credited each month with $50,000 plus 0.15 mills per kwh for all energy generated by the Facilities and shall be charged with maintenance and miscellaneous expenses of the nature included in Accounts 704, 705, 706, 707, 708 and 709 of the Uniform System of Accounts referred to in this Section.

IV. Payment to Arkansas Power & Light Company for $1,135,000 investment in facilities for back-up supply:

$1,135,000 x	5.437%	=	$ 61,710
1,135,000 x	.168%	=	1,906
1,135,000 x	.25 %	=	2,838
Total			$ 66,454

The foregoing represents cost of money (included in debt money component in I A 1 above), insurance (included in I C 6 above), and replacement payment (included in I B 1 above) components, respectively.

V. Adjustment of Base Capacity Charge—Section 4.02

The amount of the adjustment to the Base Capacity for changes in the cost of Facilities sh in Section 4.02 was determined as follows:

Amount for each $1,000,000

$1,000,000	x	5.437%	=	$ 54,370
1,600,000	x	.168%	=	1,680
Total				$ 56,050
50% applicable to AEC				$ 28,025

Maximum adjustment

$9,750,000 x 2.8025% = $273,244

VI. Amounts of Capital referred to in Section 4.03-2

In the formula in Section 4.03-2, certain capital figures are referred to in "E". They w determined as follows:

A. $104,115,000:

Total Capital	$107,250,000
Less: Amount to be spent by associate Company	1,135,000
Working Capital	2,000,000
Remainder	$104,115,000

B. $113,865,000

$104,115,000 + $9,750,000* = $113,865,000

* Representing the difference between the ceiling capital of $117,000,000 and the base capital of $107,250,000.

November 11, 1954

Atomic Energy Commission
1901 Constitution Avenue
Washington, D. C.

Attention: R. W. Cook

Re: *Memorandum Re Power Contract dated November 11, 1954 between AEC and Mississippi Valley Generating Company Contract AT-(49-1)-814.*

Gentlemen:

We are enclosing herewith a copy of the interpretative memorandum which we worked out with the staff of your Commission in connection with the negotiation of the above-mentioned contract which has just been executed and delivered. This memorandum is our understanding of the effect to be given to certain provisions of the contract.

Will you kindly confirm that it is similarly your understanding by signing and returning to the undersigned a copy of this letter?

Sincerely yours,

E. H. Dixon
E. H. Dixon, President
Mississippi Valley Generating Company

Confirmed by AEC

R. W. Cook
R. W. Cook, Acting Assistant General Manager for Manufacturing, Atomic Energy Commission

November 11, 1954

MEMORANDUM *RE* POWER CONTRACT DATED NOVEMBER 11, 1954 BETWEEN AEC AND MISSISSIPPI VALLEY GENERATING COMPANY.

During the course of negotiations of the contract between Mississippi Valley Generating Company and the United States of America, acting by and through the Atomic Energy Commission, dated November 11, 1954, Contract No. AT-(49-1)-814 the following interpretative understandings of various provisions of the contract were developed in conversations between the parties.

For convenience, the following paragraphs are keyed to the contract provision to which they principally relate.

SECTION 2.02. The Company is to furnish AEC with copies of all agreements contemplated by Section 2.02 and paragraph 1 of Section 8.16 and with copies of any amendments or modifications to any such agreements. The Company is also to furnish AEC with copies of all contracts and commitments, and amendments or modifications thereto, entered into between the Company and the institutional investors and banks, or representatives thereof, in connection with the financing of the Company's capital investment, including any bond indenture, mortgage or other evidence of indebtedness issued in connection therewith.

The term "incremental cost" which appears at the end of this Section means: "All of the costs and expenses associated with and experienced by the actual production and delivery of the product, electrical energy, over and above all of the costs and expenses which would have been incurred had there been no such actual production and delivery." This definition is also applicable to the use of the term "incremental cost" in the last sentence of paragraph 1 of Section 4.08. The parties will from time to time agree upon procedures for determining incremental cost.

SECTION 2.03. The cooperation of the parties contemplated by this Section will include the preparation of such operating memoranda or manuals through collaboration of AEC, Company and TVA as may be mutually agreed to be necessary in order to establish operating pro-

cedures for the guidance of operating personnel in the several organizations concerned with the carrying out of the provisions of the Contract.

SECTION 2.06. The Company is not to retain any firm as architect-engineers for the design of the Facilities or as general contractor for the construction of the Facilities or for the management of such construction without the prior approval of the AEC. In order to permit AEC to be fully informed as to certain matters subject to AEC review under this Section, the information to be furnished to AEC by the Company will include substantially the following information: within 6 months after the effective date of the Contract, the Company will submit an estimate of construction costs, detailed by labor and material, which will include the man-hours for each item and the wage rates on which the estimate is based. This estimate will be broken down, as far as practicable, into the units of property prescribed by the Federal Power Commission in its Order No. 45, dated January 13, 1937, and the unit cost estimate will then be summarized into the Primary Plant Accounts 301 through 393 of the Uniform System of Accounts insofar as they are applicable. The above details are not expected to include indirect or overhead charges which will be shown separately under the categories listed in the Uniform System of Accounts, Instruction 5, Electric Plant Account, Items (4) to (18), inclusive. Sufficient information will be submitted with the estimate to determine the size and capacity of the major items in each plant account. As soon as practicable after the effective date of the Contract, but in no event more than 30 months thereafter, the Company will submit for the first year of full-scale operations, an estimated income statement showing operating revenue under this Contract and operating revenue deductions (Accounts 502, Operating Expenses; 503, Depreciation; 507, Taxes; 530, Interest; 531, Amortization of Debt Discount and Expense; and 536, Interest Charged to Construction—Credit). Account 502 should be detailed by the Primary Accounts 701 through 809 as applicable. Details of the estimated taxes will be shown by class of tax, and the interest charges and debt expense will be shown separately for each class of debt or obligation issued. Amounts in Account 536 should indicate the portion of the credit arising from equity capital, bonds, notes, etc., and commitment fees.

During the period when paragraph 2 of Section 7.07 would be effective in the event of cancellation, the Monthly Progress and Cost

Reports required to be furnished to AEC under the last sentence of this Section are to include a statement of expenditures made and estimated cost of cancellation of commitments which AEC would be required to pay in the event of cancellation under the provisions of that paragraph.

SECTION 3.01. The provisions of this Section are not intended to apply to any power and energy becoming available to the Company during periods of test operation of any unit prior to the commencement of commercial operation of such unit. It is understood that if such power and energy does become available during test operation, and if Company and AEC then agree that such power and energy shall be furnished to and taken by AEC, the arrangements therefor will be covered by a separate agreement between the parties.

When the Company obtains service from the Sponsoring Companies or their subsidiaries in order to provide the additional service referred to in the second last sentence of this Section, it is understood that the "cost to the Company" of obtaining such service is to be the cost incurred by the Sponsoring Company or subsidiary thereof plus transmission losses plus a loading factor of approximately one mill per Kwh.

The second sentence of this Section provides: "The AEC may schedule or take service at any rate which would not require the operation of any generating unit of the Facilities at a rate less than the equivalent of 70 Mw at the Primary Delivery Points *except as may be mutually agreed to from time to time* and which would not, *except upon reasonable notice*, result in starting up or shutting down any such unit."

The Company has submitted two separate memoranda, dated September 14 and September 16, attached to this memorandum, covering the expected operation of the boiler and generating units from minimum load to increased load and the requirements for starting, loading and shutting down unit overnight. It was agreed, rather than attempting to spell out at this time permanently fixed limits both as to minimum loading and notice of shut-down, to incorporate the above italicized phrases in the Contract with the intention that these operating conditions can later be provided for in contemplated agreements among AEC, TVA and the Company and be modified from time to time as actual in-service experience is obtained.

SECTION 4.01. The term "no-load fuel" used in this Section means "the quantities of fuel that are required to keep the turbo-generators operating at rated speed with steam pressures and temperatures maintained at proper levels and carrying no load other than that equivalent to the station auxiliaries in service, all as required to permit the production of externally useable power and energy upon notice and demand by the customer."

SECTION 4.02. It is understood that the cost of the Facilities, as defined in the second sentence of this Section, shall not include any travel or similar expenses incurred by or salary paid to any officer or employee of Middle South Utilities, Inc. or The Southern Company in the preparation and presentation of the proposals made by the Company to AEC or in the negotiation of the Contract. The foregoing statement is not intended to create any implication as to the allowability or non-allowability of any other item of cost.

In computing the Interest during Construction component of the cost of the Facilities the rate of return on equity capital is not to exceed 6%.

SECTION 4.03. In the definition of the factor "R" used in the formula in paragraph 2 of this Section, it is understood that the term "composite rate" will mean that the estimated rate will take into consideration the fact that, under current Federal income tax rates, surtax is not paid on income up to $25,000 and the fact that in future years there may be varying rates or bases of tax at various levels of income.

In the formula used in paragraph 2, the "R" factor is defined as the "estimated composite rate of applicable Federal taxes levied upon or measured by income, expressed as a percentage and determined for the succeeding quarter yearly period by agreement." In the determination of the estimated composite rate the income before taxes will be assumed to be that amount, which after estimated taxes, would yield the return on equity capital equal to the "E" factor in the formula.

SECTION 4.09. If the provisions of the second sentence of this Section become applicable, it is understood that the amendment or supplement to the Contract contemplated in this sentence will include a provision that, should the AEC make additional payments thereunder,

such payments, after providing for any applicable taxes, will be used currently to retire bonds and to pay any required premium for such retirement.

SECTION 4.10. This Section provides that, upon termination of the contract, the amounts payable on account of replacements under Section 4.11 shall be reduced in the same proportion as the Contract Capacity is reduced. One of the components of the credit provided for AEC under Section 7.04 in the event of its relinquishment of terminated capacity is $250,000, representing an estimated annual replacement payment. Accordingly, if the AEC relinquishes the total Contract Capacity after notice of termination and receives a credit therefor pursuant to Section 7.04, the parties will review the effect of Section 4.11 to determine what adjustment, if any, should be made in the payments by the AEC under that section as contemplated by the next to the last sentence thereof in order to insure that the amounts thereafter paid by the AEC under Section 4.11 will be equal to the amount in respect to replacements included in the credit received by the AEC under Section 7.04 and that the AEC will not thereafter make any net payment in respect of replacements. In the event of a partial relinquishment of Contract Capacity pursuant to which a credit is given to the AEC under Section 7.04, there will be a pro rata application of the foregoing adjustment. Such review of the effect of Section 4.11 will include consideration of the timing of the distribution of the replacement reserve contemplated by the last sentence of that Section.

SECTION 4.11. The parties will establish a line of demarcation between those items of equipment, the appropriate replacement of which will constitute a proper charge against the replacement reserve established under this section, and those items, the replacement of which is a proper charge to maintenance expense. In establishing this line of demarcation, it is intended that applicable instructions in the Uniform System of Accounts and applicable orders of the Federal Power Commission with respect to differentiation between maintenance and replacements will be followed. The parties intend from time to time to review and make such revision of this line of demarcation as may be necessary and agreed to be appropriate.

This Section contains the following provisions: "The Company will maintain on its books a replacement reserve and will credit to such reserve all amounts received by it from the AEC under this Section after deducting therefrom Federal income taxes, if any, which may be payable by the Company with respect to the receipt by it of such payments after reflecting the effect of any additional depreciation referred to in clause (ii). All charges for replacements, except replacements paid for out of the proceeds of insurance or out of amounts paid to the Company by third parties, shall be charged to the replacement reserve. Any net earnings, after any applicable taxes thereon, resulting from investment of the Company's funds allocable to the replacement reserve, will be credited to such reserve." It is understood that funds credited to the reserve account are not to be used as working capital by the Company, the need for such working capital having been provided for by initial financing; but, after retaining a reasonable cash balance to meet current requirements, if any, for which the reserve was established, such funds may be invested in such securities as AEC approves and the net income from such investments, after any applicable taxes on such income, are to be credited to the replacement reserve. If the Company shall receive a tax refund because of any payment made to the AEC pursuant to the last sentence of Section 4.11, such refund shall be deemed to be a part of the replacement reserve for the purposes of that sentence.

The principles stated in the preceding paragraph apply equally to the Reserve for Deferred Maintenance established under the provisions of Section 4.14 and to any distribution thereof under the last sentence of paragraph 1 of Section 4.14.

In the event the AEC delivers a notice of termination of the Contract and requests a joint examination and review of the matter of payments under Section 4.11 as provided therein, the Company will be agreeable to an immediate review with respect to the payments under Section 4.11 thereafter.

Section 4.14. The third sentence of paragraph 1 of this Section requires that the Company credit excess revenues to a Special Reserve Account and impound and deposit such excess in a Special Fund "which shall not be available to the Company or the AEC except upon the making of payments therefrom pursuant to the following provisions." The

following sentence provides: "Any net earnings, after any applicable taxes thereon, resulting from the investment of such impounded funds shall be credited to the Special Fund." It is intended that the Company may invest monies deposited in the Special Fund in such securities as the AEC approves; but that the Special Fund is not to be available to the Company or the AEC for any other purpose except for the making of payments therefrom as provided in this Section.

The 10th sentence of paragraph 1 of this Section 4.14 provides: "For purposes of this Section net income shall be derived in accordance with the Uniform System of Accounts," etc. It is understood that, in the determination of net income, the cost of power and energy received from sources other than the Company's generating facilities, and delivered to AEC as a part of its contract entitlement under Section 3.01, is to be taken to be the product of the number of kilowatt-hours of energy so received and delivered during the period for which the determination of net income is made multiplied by the Contract Energy Charge, and plus 0.15 mills per Kwh as the agreed-upon applicable no-load fuel component of power cost.

The last two sentences of paragraph 1 of Section 4.14 provide as follows: "Upon expiration of this contract, either by expiration of the term provided for in Section 7.01, by termination or otherwise, the Company and the AEC shall agree upon the amount necessary, giving effect to accumulated maintenance requirements, to place, or to provide for placing, the Facilities in the dependable and efficient operating condition required for providing the service herein provided for during the unexpired term, including permissible extensions thereof under Section 7.08 hereof, all in accordance with practices prevailing among prudent operators of similar properties. If, after providing for such maintenance, any amount shall remain in the Reserve for Deferred Maintenance such amount shall be equally divided between the parties."

In making the above determination, the parties will follow these principles:

1. The Facilities will be adequately maintained on a current basis. Consequently consideration will be given principally to accrued current maintenance and to major maintenance and repair operations recurring in accordance with established company standards in cycles of more than one year.

2. The estimated cost will not include any duplication of any maintenance or repair operation.

3. As to any item having a normal maintenance cycle longer than one year, under normal conditions only that portion of the estimated cost of the next normal maintenance operation will be included which represents the relation of the expired part of the normal maintenance cycle, as of the date of expiration, to the total normal maintenance cycle; e.g., if an item of equipment normally undergoes a maintenance or repair operation every tenth year and the contract expires at the end of the third year, there will be included under normal conditions only 3/10 of the estimated cost of the next maintenance or repair operation.

4. The cost of modernizing any portion of the Facilities will not be included to the extent chargeable to plant account under the Uniform System of Accounts.

5. The cost of any replacements customarily made in Section 4.11 will not be included.

Within twelve months after the Facilities are placed in operation, the Company will furnish AEC with a list of the items of plant, the maintenance of which are on a cyclic period of more than one year, and the estimated cyclic period applicable to such item, and will revise such list from time to time as experience indicates.

SECTION 7.04. The following are sample calculations of the effect of absorption by the Company of capacity that AEC has previously relinquished under the provisions of this Section (figures are rounded out for simplicity).

"A"	Capacity Charge—600 MW		$9,000,000
	Credit for relinquishment 600 MW	(—)	1,500,000
	Adjusted Capacity Charge—600 MW		7,500,000
	Company absorbs 250 MW	(—)	3,750,000
			3,750,000
	Decrease Credit $\frac{250}{600}$ x $1,500,000	(+)	625,000
	Capacity Charge—350 MW		$4,375,000

"B"	Capacity Charge—600 MW		9,000,000
	Credit for relinquishment 600 MW	(—)	1,500,000
	Adjusted Capacity Charge—600 MW		7,500,000
	Company absorbs 100 MW	(—)	1,500,000
			6,000,000
	Decrease Credit 1/6 x $1,500,000	(+)	250,000
	Capacity Charge—500 MW		$6,250,000
"C"	Capacity Charge—600 MW		$9,000,000
	Credit for relinquishment 600 MW	(—)	1,500,000
	Adjusted Capacity Charge—600 MW		7,500,000
	Company absorbs 300 MW	(—)	4,500,000
			3,000,000
	Decrease Credit ½ x $1,500,000	(+)	750,000
	Capacity Charge—300 MW		$3,750,000

Section 7.07. The term "losses resulting from such cancellation", used in Line 16 of paragraph 2 of this Section does not include any loss of anticipated profits.

Section 8.23. The decision of the arbitrators, in any case where such decision is to be made on the basis of an amendment to the contract, is required to include findings that such decision is "desirable in the business of the Company and the AEC, is not prejudicial to the interests of the holders of the outstanding indebtedness of the Company and will not impair any security therefor." The following statement will clarify the intent of the quoted language:

The Contract will be pledged under the mortgage and as a result the Company will no longer be free to consent to amendments to it without complying with the standards which are in the mortgage to the effect that the amendment is desirable in the business of the Company, is not prejudicial to the interests of the holders of the bonds and will not impair the security therefor. Similar provisions are general under mortgages under which contracts are pledged as security. The pur-

pose of the quoted provision is to enable the Company to comply with these anticipated requirements of the mortgage.

Some of the sections listed in 8.23 provide for an over-all downward adjustment under certain conditions. The Company is of the opinion that under such sections, if arbitration becomes necessary because the parties fail to agree there will be no difficulty in making the above referred to findings so as to be able to make the modifications necessary for such "over-all downward adjustments" and at the same time comply with the requirements of the mortgage, since it will be desirable in the business of the Company and in their relationship with the AEC to make the adjustments provided for if they are not prejudicial to the holders of the bonds and will not impair the security therefor. Section 8.02—Use of Fuels or Sources of Energy Other Than Coal—is an example. The same principles are considered to be applicable to all matters subject to arbitration under this Section.

Sections 2.04 and 8.02. The Company has no present intention of converting to any fuel or source of energy other than coal under the provisions of Section 8.02. In the event that in the future such conversion should become economically advantageous and it should be decided to effect such conversion, it is understood that Section 2.04 would not be applicable with reference to priority assistance but that Section 2.04 is applicable solely to the original Facilities referred to in Section 1.01.

Ebasco Services Incorporated
New York, 14 September 1954

MISSISSIPPI VALLEY GENERATING COMPANY
MINIMUM LOAD

Restudy of minimum-contract load shows that the presently stated 35% of delivery per unit at river center line, equivalent to 70 mw, be retained as an absolute minimum. This figure is considered to be the present practical lower limit of operation recommended by equipment manufacturer and experienced in central station operation with large modern generating units. It is based on all burners in operations.

The minimum output of the generating plant is fixed by the requirements of the steam generating unit and its firing equipment. The requirement for continuous commercial operation at minimum load is that the slag in the furnace bottom be in liquid state to permit ash removal by tapping. Operation at less than the recommended minimum load results in decreased temperature in the furnace bottom and causes the liquid ash to become more viscous, accompanied by solidification in the cooler sections of the furnace bottom. The extent of decreased fluidity and rapidity of ash solidification depend on variable coal properties, inherent characteristics of the furnace and the degree to which judicious manual operation of cyclone burners may tend to equalize furnace bottom temperatures. Only actual in-service experience can establish the practical commercial low limit of continuous output for a given installation.

To ensure plant response to varying demand, all essential auxiliaries, including all cyclone furnaces, must be in operation at the minimum continuous commercial output to enable automatic plant controls to pick up load. The manufacturer of the steam generating unit equipment estimates that with all cyclone burners in operation (six per boiler unit) the minimum stable output with satisfactory and continuous slag tapping may be approximately 33% to 40% of maximum boiler rating. The 70 mw (35%) suggested minimum contract load is equivalent to 31.5% of boiler rating.

Discussion by Mr. P. E. Gourdon, Consulting Mechanical Engineer of Ebasco Services Incorporated with Mr. S. Fiala, Consulting Mechanical Engineer of American Gas & Electric Company, concerning stable minimum load operating conditions of AG&E's various 200 mw units has developed the information that their liquid slag tap bottom type of furnaces can be operated at not much less than 50% rating. They feel this is a practical lower limit which can be achieved under normal routine operating conditions. Reduction below this level; down to one third or 40% rating as anticipated by the boiler manufacturer, may be possible but only under controlled test set-up conditions according to Mr. Fiala. Experience shows that AG&E units can be operated over a weekend or over a night shift at somewhat less than 50% output, resulting in accumulation of furnace bottom ash which must be melted in resuming higher load.

It may be of general interest to report the following comments from Mr. Fiala in respect to their new Kanawha plant which consists of two 217 mw units with boilers of dry bottom type. With all burners in service, the lower limit of stable operation has been found to be about 65% of full load, based on good coal conditions. By removing burners progressively, Mr. Fiala states, 40% loading can be reached, but this they consider to be the absolute minimum load. In general, AG&E consider that the practical minimum load that can be carried by dry bottom furnaces is 50% of rated capacity, and slightly less than 50% for slag tap type.

Taking all things into consideration, also in view of manufacturer's statements in regard to their equipment and central station experience in operation of large coal burning plants, it is recommended that the 35% minimum load point presently stated in the contract should not be reduced.

P. E. Gourdon

Ebasco Services Incorporated
New York, N. Y.
16 September, 1954

MISSISSIPPI VALLEY GENERATING COMPANY PLANT STARTUP AND LOADING, ETC.

A separate memorandum dated 14 September 1954 discusses the basis for the 35 per cent minimum load point (per unit) presently stated in the draft contract. That memorandum covered practical operating considerations relative to the steam generating unit and the need for keeping all cyclone burners in operation down to this minimum load point to permit continuous slag tapping and to enable the unit to be controlled automatically between the mimimum load point and full load.

This memorandum summarizes reasonable operating time requirements for starting, loading and shutting unit overnight. The time factors shown on the attached schedule are best estimates based on preliminary boiler data and industry recognized boiler-turbine operating considerations. These time estimates are subject to review after final equipment design and operating factors are crystallized with the manufacturers. In any event, actual in-service experience will be the final guide in determining the essential time requirements. During emergencies or abnormal situations, however, it may be necessary to operate under time allowances greater or less than those estimated herein.

System disturbances which can result in loss of loads and trip-outs are considered as occurrences which must be met by proper operating practices and procedures.

This study discusses cold and hot-condition startups, loading to minimum contract load and to full load; reducing load; and considerations in connection with overnight shutdown.

The 35 per cent load point (equivalent to about 70 mw delivered at river centerline) shown in the attached schedule is the minimum to which each unit may be loaded as presently specified in the draft contract; at this load all cyclone furnaces are in operation. As load is reduced below 35 per cent, cyclone burners are removed manually from

service in step with load requirements. Furnace bottom temperatures will then decrease resulting in a more viscous slag with some freezing in the cooler areas, and after a prolonged period of operation at these lower loads continuous slag tapping will be impossible. The length of time at which commercial operation at loads somewhat below 35 per cent may be maintained can only be determined by actual operating experience. As an illustration, the boiler manufacturer states that operation with only one cyclone burner in service (equivalent to 15-mw load) may be possible for a period equivalent to a weekend; however, furnace-bottom slag would accumulate and solidify in the interim. Following such slag accumulation it would be necessary to operate at high load approximately 48 hours in order to melt the slag and restore operation on a continuous slag-tap basis. The foregoing operations to be carried out with due regard to safety considerations.

The 60 per cent load point referred to on the time schedule is significant in the loading regimen because it is the estimated load above which main steam and reheat steam temperatures are substantially constant.

It must be recognized that irrespective of time intervals mentioned herein, system conditions will influence what can be done, how slow, how fast, rate of loading, rate of unloading, etc.

Comments appropriate to the attached time schedule are summarized below:

Starting and Loading

Time interval for start from cold condition of boiler and turbine is governed by several factors of which consideration of permissible rate of drum metal temperature change is one of the major—generally recommended not to exceed 80 to 100 F per hour. Temperature change from assumed ambient condition of 50 F to approximately 650 F, (corresponding to saturation temperature in the boiler drum at full-load pressure) represents a 600 F total temperature rise. This operation requires at least 7 hours of starting time under manufacturer's normal recommendations. Some work has recently been done by a few utilities on development of techniques for rapid and controlled boiler-turbine startup which requires additional instrumentation and close supervision by the operators. Since these techniques are still new and can

only be established for each installation by actual test, our present study, and contemplated operation, is predicated on the normal practices of the industry.

The turbine can be brought on the line from cold condition during the latter phases of boiler startup, requiring no extra time beyond the 7 hours mentioned for the steam generating unit.

Time interval necessary to start the turbine from a hot condition is predicated on the boiler being "bottled up" from the previous night's shutdown and the turbine metal temperatures having dropped to a given level as determined by the previous night trip-off load-point. Turbine manufacturers' usual time recommendations are followed in bringing the unit to 10 per cent load from turning gear condition. The time required for progressive loading to 100 per cent is also governed by manufacturers' time-temperature relations which should be maintained for trouble-free operation. The estimated temperature changes tabulated on the attached schedule are predicated on preliminary boiler data, which shows 800 F main steam temperature at 10 per cent load, 950 F at 35 per cent load, and 1050 F at loads above 60 per cent.

In summary, the elapsed time necessary to reach 35 per cent load from cold start is estimated to be at least 7 hours; from hot start it requires about 7 minutes. Elapsed time from cold start to 100 per cent load is about 7 hours 20 min and from hot start approximately 90 minutes.

Unloading and Overnight Shutdown

Decreasing the boiler load to 35 per cent is readily handled by automatic combustion (and other) controls responding to turbine unloading. The turbine is unloaded in accordance with turbine manufacturer's time-temperature recommendations which are practically the same as for load pickup.

Based on preliminary boiler superheater data for this installation, a unit scheduled for overnight shutdown should be tripped at about 25 percent load to provide desirable turbine startup temperature conditions the following morning. The main steam temperature at the 25 per cent load point is about 900 F and assuming a 200 F turbine temperature drop during the night, the high-pressure turbine section will be at about 700 F temperature the following morning. The

"bottled up" boiler will lose approximately 300-500 psi drum pressure overnight; corresponding to about 620 F residual drum temperature the following morning. During turbine startup saturated steam leaving the boiler drum and passing through the superheater at the time of venting will pick up some superheat as the boiler is being fired with the result that the temperature of the steam entering the turbine will closely approach turbine metal temperature.

The elapsed time required to drop from full load to 25 per cent load is estimated to be 20 minutes. Reducing the load to tripoff or 25 per cent load requires an additional 10 minutes or a total elapsed unloading time of 30 minutes from full load to tripoff.

P. E. Gordon

PEG:amp

ESTIMATED TIME SCHEDULE

	Equipment Governing	Estimated Temp Change	Time
Starting and Loading			
1A Start from cold condition and load to 35%	Steam Generator	600F in drum	7 hr (minimum)
(Note—Turbine start-up and loading will be concurrent with boiler.)			
1B Start from hot condition following an overnight shutdown and load to 35%			
a. From turning gear to synchronous	Turbine	—	30 min
b. From no load to 10% rated load	Turbine	—	Immed
c. Hold at 10% load (to stabilize exhaust hood temperature)	Turbine	—	20 min
d. Load from 10% to 35%	Turbine	150F at throttle	20 min avg.*
Subtotal for 1B (a) through (d)			70 min.
2 Load from 35% to 60%	Turbine	100F at throttle	15 min avg.*
3 Load from 60% to 100%	Mainly Combustion Controls	0F at throttle	5 min avg.*
4 Elapsed Time—from cold start			
a. To 35% load	—	—	7 hr
b. To 100% load	—	—	7 hr—20 min
5 Elapsed Time—from hot start			
a. To 35% load	—	—	70 min
b. To 100% load	—	—	90 min
Unloading and Overnight Shutdown			
1 Unload from 100% to 60%	Mainly Combustion Controls	0F at throttle	5 min avg.*
2 Unload from 60% to 35%	Turbine	100% at throttle	15 min avg.*
3 Unload from 35% to 25% to reduce turbine metal temperature before tripoff	Turbine	50F at throttle	10 min avg.*
4 Tripoff at 25% load and place on turning gear overnight		—	—
5 Elapsed time—from 100% load			
a. To 35% load	—	—	20 min
b. To Tripoff at 25% load	—	—	30 min

* Provided system can absorb load at the rate implied—such a transferring load from one plant to another.

Washington, D. C.
November 11, 1954

Re: **Contract No. AT-(40-1)-814 dated November 11, 1954 and Supplement No. 1 thereto, dated November 11, 1954, between Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission.**

ATOMIC ENERGY COMMISSION
Washington, D. C.

Attention: *K. D. Nichols, General Manager, and R. W. Cook, Acting Assistant General Manager for Manufacturing*

Dear Sirs:

The Contract and Supplement referred to above (hereafter collectively called "the Contract") are being executed and delivered today on the understanding and condition that if, by February 15, 1955, the effective date of the Contract shall not have occurred as provided in Section 8.22 thereof, and valid regulatory approvals in form and substance satisfactory to the Company shall not have been obtained which are necessary to permit it to issue shares of its capital stock to the Sponsoring Companies and to permit them to purchase and pay for such shares, either party to the Contract may thereafter terminate it by written notice without liability of either party to the other.

It is our understanding that this letter has been presented to the Atomic Energy Commission, together with the Contract, and that the execution and delivery of the Contract on the basis herein set forth has been authorized by the Commission.

Will you please confirm the foregoing by signing in the place indicated below and returning to the undersigned the enclosed copy of this letter.

Very truly yours,

MISSISSIPPI VALLEY GENERATING COMPANY

By: E. H. DIXON
President

The understandings and condition expressed in the foregoing letter are hereby confirmed:

United States of America, by and through the Atomic Energy Commission.

By: R. W. COOK
Acting Assistant General Manager for Manufacturing.

Approved: K. D. NICHOLS
General Manager.

Washington, D. C.
November 11, 1954

***Re:* Contract No. AT-(40-1)-814 dated November 11, 1954, between Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission.**

ATOMIC ENERGY COMMISSION
Washington, D. C.

Attention: *K. D. Nichols, General Manager, and R. W. Cook, Acting Assistant General Manager for Manufacturing*

Dear Sirs:

On April 10, 1954, when the proposal was made on the basis of which the contract referred to above has been negotiated, it was expected that if the proposal was accepted as a basis for negotiation and resulted in a contract, such contract would become effective within a reasonable time. The proposal was based upon financial and economic conditions as they existed in April 1954.

Contrary to such expectations of last April, seven months have elapsed, the contract is not yet effective, and the Sponsoring Companies are still not authorized by regulatory order to invest funds in the Company and the Company is not in a position to make firm commitments for debt financing, land, equipment or materials. The proposal was submitted with the understanding that there was an urgent need for power at the earliest date and the estimated cost of Facilities on which the rate structure is based envisioned early completion of negotiations and initiation of construction so the necessary foundation work and other appurtenant structures could be completed during low water conditions on the Mississippi River. Since the proposal was submitted the Engineering News Record Cost Index of construction costs for labor and material have increased. Past experience for the last eight years indicates that this rise will continue. In fact, since March 1954 through October 1954 the Engineering News Record Construction Index has risen approximately 4.4%.

In order to place the Company in a position to proceed promptly with its work under the contract to meet the power requirements the contract is designed to meet, the Sponsoring Companies have taken options on land, have done certain exploratory and preliminary engineering work and have taken options on important items of equipment. In addition, during the past seven months executive officers and senior employees of both Sponsoring Companies as well as counsel to both such companies have been required to spend substantial amounts of time in connection with the proposal, the negotiation of a contract and related matters.

As long as the contract may become effective, the Company must keep in a position to perform. As long as the position of the Company under the contract remains uncertain this drain on the time of executives and these expenses will continue. In view of the limited prospects for profit in the contract, the companies cannot continue this course indefinitely.

Accordingly, we are executing and delivering the Power Contract on the understanding and condition expressed in the accompanying letter agreement.

Very truly yours,

MISSISSIPPI VALLEY GENERATING COMPANY

By: E. H. DIXON
President

Letter Contract No. AT-(40-1)-815

November 11, 1954

U. S. ATOMIC ENERGY COMMISSION
Washington, D. C.

This Letter Contract will confirm understandings reached between Middle South Utilities, Inc. and the Southern Company (hereinafter referred to as the "Sponsoring Companies") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") relative to the furnishing of power to the Commission upon the contingencies and subject to the terms and conditions hereinafter set forth.

1. In either of the following events, and for the periods therein stated, namely:

(a) In the event that the term of the Power Contract, dated November 11, 1954, between the Commission and Mississippi Valley Generating Company (hereinafter referred to as the "Power Contract") as a contract for electric utility service shall not have commenced on or prior to the last day of the 36th calendar month commencing after the effective date of the Power Contract, then during the period commencing with the first day of the next succeeding calendar month and terminating on the date that the term of the Power Contract as a contract for electric utility service shall commence, or on the termination of the Power Contract for any cause, whichever event shall first occur, or

(b) In the event that the Company is not in a position, on or before the last day of the second calendar month commencing after the date of commencement of the Power Contract as a contract for electric utility service, to deliver commercially under the Power Contract substantially 400,000 kw, then during the period commencing with the first day of the next succeeding calendar month and terminating on the date on which the Company is in a position to deliver commercially under the Power Contract substantially 400,000 kw, or on the termination of the Power Contract for any cause,

the Sponsoring Companies, or subsidiaries thereof, will be obligated to supply, severally and separately and in the proportions

of 80% for the Middle South System and 20% for the Southern Company System, and the Commission will be obligated to pay for, 100,000 kilowatts of firm capacity (hereinafter called "Interim Power").

2. The monthly capacity charge for Interim Power shall be $1.50 per kw. The rate for energy delivered in connection with Interim Power shall be 1.863 mills per kilowatt-hour. The Commission shall pay in addition any increased cost incurred by the Sponsoring Companies or their subsidiaries on account of the delivery of power and energy hereunder due to any increased state and local taxes, and the Commission shall receive a credit for any decreased costs due to any decreased state and local taxes, in either event resulting from tax legislation having initial effectiveness subsequent to August 4, 1954, to the extent that any such tax is based on gross revenue, energy generated or sold, or on any other basis capable of direct distribution.

3. In either event described in Paragraph 1 above, the Commission and the Sponsoring Companies, or subsidiaries thereof, will enter into a formal contract for the supply of Interim Power (hereinafter referred to as the "Interim Power Contract"). Such contract will include, in addition to the provisions described in Paragraphs 1 and 2 above, the following terms and conditions:

(a) Delivery points shall be those described as Primary and Secondary Delivery Points in the Power Contract.

(b) Delivery arrangements and conditions of supply and use shall be similar to those described in Sections 3.02, 3.03, 3.04, 3.05 and 3.07 of the Power Contract, to the extent that the same are applicable.

(c) Billing and metering arrangements shall be similar to those described in Articles V and VI of the Power Contract, to the extent that the same are applicable.

(d) If the term of the Interim Power Contract shall extend for a period in excess of six months, the Commission shall thereafter have the right to terminate the Interim Power Contract upon 60 days prior written notice to the Sponsoring Companies and all rights and obligations of the parties under the Interim

Power Contract shall cease upon the date stated in such notice except as to any amount owed by any party under the Interim Power Contract on that date.

(e) The Interim Power Contract will include, to the extent applicable, provisions similar to Sections 8.03, 8.05, 8.08, 8.09, 8.10, 8.11, 8.12, 8.13 and 8.18 of the Power Contract and any other provisions required by law to be included in contracts of the Commission.

(f) The Interim Power Contract shall be subject to the availability of appropriated funds and shall also contain such other terms and conditions as shall be mutually agreeable to the parties.

4. This agreement and the Interim Power Contract are subject to present and future valid laws and to requirements of duly constituted regulatory authorities having jurisdiction.

If the foregoing states satisfactorily our understandings, will you kindly indicate your concurrence below.

MIDDLE SOUTH UTILITIES, INC.,

By E. H. DIXON

E. H. DIXON, *President*

THE SOUTHERN COMPANY,

By J. M. BARRY

J. M. BARRY, *Chairman of the Executive Committee*

Accepted:

U. S. ATOMIC ENERGY COMMISSION,

By R. W. COOK

R. W. COOK
Acting Assistant General Manager
for Manufacturing

November 11, 1954

November 11, 1954.

U. S. Atomic Energy Commission,
Washington, D. C.

Attention: K. D. Nichols,
General Manager.

Gentlemen:

Referring to the provisions relating to absorption contained in Article VII of the Power Contract between you and Mississippi Valley Generating Company dated November 11, 1954, as amended by supplemental agreement dated the same day, each of us agrees that, in the event of termination of such Power Contract under the provisions of that Article, it and its subsidiaries will give you and your representatives such access, as you may reasonably request and require, to data in its or their possession relevant to a determination of how rapidly the growth of load will permit absorption of Contract Capacity under the provisions of said Article.

Sincerely yours,

MIDDLE SOUTH UTILITIES, INC.

By: E. H. DIXON
E. H. Dixon,
President

THE SOUTHERN COMPANY

By: J. M. BARRY
J. M. Barry,
Chairman of the Executive Committee

MISSISSIPPI VALLEY GENERATING COMPANY

November 24, 1954

MR. R. W. COOK, Assistant General
Manager for Manufacturing
Atomic Energy Commission
Washington, D. C.

Dear Mr. Cook:

Your letter of November 23, 1954, regarding the meaning of Section 4.14 of Contract No. AT-(49-1)-814 of November 11, 1954, between Mississippi Valley Generating Company and the Atomic Energy Commission, has been referred to me in Mr. Dixon's absence. I have discussed your letter over the telephone with Mr. Dixon and have also taken it up with other representatives of Mississippi Valley Generating Company who were present at the meetings when the contract was negotiated.

This letter will confirm to you that your recollection of our conversations and mutual understandings regarding the interpretation of Section 4.14, as set forth in your letter to Mr. Dixon of November 23, 1954, is correct.

Sincerely yours,

PAUL O. CANADAY
PAUL O. CANADAY
Vice President

POC:fd

From the Offices of the
Joint Committee on Atomic Energy

November 13, 1954
FOR IMMEDIATE RELEASE

The Joint Committee on Atomic Energy, meeting in executive session, today adopted the following resolution by a vote of ten to eight:

"RESOLUTION

"Whereas, the Joint Committee on Atomic Energy is vested with certain duties and authorities by virtue of the provisions of the Atomic Energy Act of 1954, and

"Whereas, Section 164 of the Atomic Energy Act of 1954 requires that certain contracts for electric utility services entered into by the Atomic Energy Commission be submitted to the Joint Committee on Atomic Energy and a period of thirty days elapse while Congress is in session before the contract shall become effective, and

"Whereas, Section 164 of the Atomic Energy Act of 1954 further authorizes the Joint Committee at any time after the receipt of the proposed contract to waive the conditions of or all or any portion of such thirty day period, and

"Whereas, the Atomic Energy Commission has submitted a signed contract between the Atomic Energy Commission and the Mississippi Valley Generating Company to the Joint Committee by letter of transmittal dated November 11, 1954, as follows:

UNITED STATES ATOMIC ENERGY COMMISSION

Washington 25, D. C.

November 11, 1954.

Dear Mr. Cole:

In response to your request at the opening of the hearings after recess at 2:00 P. M., November 6, 1954, we are transmitting to you herewith for filing with the Joint Committee on Atomic Energy, pursuant to Section 164 of the Atomic Energy Act of 1954, Contract No. AT-(49-1)-844 dated November 11, 1954 together with Supplement No. 1 thereto of the same date, which have been entered into today by and between the Mississippi Valley Generating Company and the United States of America acting by and through the Atomic Energy Commission, together with the following related documents:

1. Letter dated November 11, 1954 from Mississippi Valley Generating Company to the Atomic Energy Commission, confirmed by the latter, regarding execution and delivery of the power contract.
2. Letter dated November 11, 1954 from the Mississippi Valley Generating Company to the Atomic Energy Commission outlining the reasons for the above letter.
3. Interpretative Memorandum re power contract dated November 11, 1954.
4. Letter Contract No. AT-(49-1)-815 dated November 11, 1954 between the Atomic Energy Commission and the Middle South Utilities, Inc. and The Southern Company with reference to certain interim power in the amount of 100,000 kilowatts.
5. A copy of the opinion of the General Counsel of the Atomic Energy Commission required under Section 8.15(3) of the Contract.

Sincerely yours,

/S/ LEWIS L. STRAUSS
Chairman

Honorable W. STERLING COLE
Chairman, Joint Committee
on Atomic Energy
Congress of the United States

"WHEREAS, the Atomic Energy Commission has requested in writing that the Joint Committee waive the conditions of the thirty day period specified in Section 164 of the Atomic Energy Act of 1954, and

"WHEREAS, the Joint Committee has held extended hearings on the proposed contract pursuant to which many changes were made therein which adequately protect the interest of the United States;

"NOW, THEREFORE, BE IT RESOLVED THAT the Joint Committee on Atomic Energy, pursuant to Section 164 of the Atomic Energy Act of 1954 do hereby waive the conditions of and all of the thirty day period specified in Section 164.

October 5, 1954

B-120188

HONORABLE LEWIS L. STRAUSS, Chairman
Atomic Energy Commission
Washington 25, D. C.

Dear Mr. Chairman:

I have your letter of September 24, 1954, transmitting a copy of a power contract proposed to be entered into between the Atomic Energy Commission and the Mississippi Valley Generating Company, a company organized by Middle South Utilities, Inc., and The Southern Company.

The contract provides that it shall not be effective until the happening of certain events, one of which is the receipt by the contractor of an opinion of the Comptroller General of the United States.

> "* * * to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

You state that the Atomic Energy Commission is of the opinion that it has power and authority to execute the contract and to perform all the obligations thereby imposed upon it, including the making of all payments required under any provisions of the contract. However, because of the above-quoted contract provision, you request my views.

The contract in question, known as the Dixon-Yates contract, calls for the construction by the Mississippi Valley Generating Company of a steam electric generating station of approximately 650,000 kilowatts capacity near West Memphis, Arkansas, of which 600,000 kilowatts will be available for a 25-year period to the Tennessee Valley Authority for the account of the Atomic Energy Commission in replacement of power furnished by the TVA to the AEC. The power considered as being replaced is understood to be a part of that which will be furnished by the TVA to the AEC installation at Paducah. The power to be furnished under the Dixon-Yates contract will be delivered to and distributed by the TVA for use in the Memphis area.

At the time the Atomic Energy Act of 1954 was under consideration by the Congress negotiations for the Dixon-Yates contract had already been undertaken by the Atomic Energy Commission, and a question arose whether the authority of the Commission under section 12 (d) of the Atomic Energy Act of 1946, as amended (section 164 of the 1954 act), was broad enough to cover such an arrangement. In order to resolve any doubt on this point Senator Ferguson offered an amendment to the section, the purpose of which was specifically stated to be to authorize the Dixon-Yates contract. Cong. Record,

July 19, 1954, p. 10430. The Ferguson amendment was adopted (Cong. Rec., July 21, 1954, pp. 10770-71), and became a part of section 164. As amended, section 164 now reads in pertinent part as follows:

"Sec. 164. Electric Utility Contracts. The Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission, without regard to section 3679 of the Revised Statutes, as amended, to enter into new contracts or modify or confirm existing contracts to provide for electric utility services for periods not exceeding twenty-five years, and such contracts shall be subject to termination by the Commission upon payment of cancellation costs as provided in such contracts, and any appropriation presently or hereafter made available to the Commission shall be available for the payment of such cancellation costs. * * * The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof. * * *"

In my opinion the foregoing language of section 164 and its legislative history authorizes the AEC to execute the Dixon-Yates contract, to obligate the United States to make payments as required by the contract, and to make payment of cancellation charges out of funds now or hereafter made available for expenditure to the AEC.

Mention also should be made of section 165 of the Atomic Energy Act of 1954 which prohibits direct payment or direct reimbursement by the AEC of Federal income taxes on behalf of section 164 contractors. The conference report on this provision states (House Report No. 2666, p. 50) that it was not intended to prohibit the inclusion of such taxes in the computation or adjustment of the base rate or cost structure of the contract. While sections 4.03, 4.09, and 4.11 of the Dixon-Yates contract provide for adjustments in payments to be made to the contractor based upon the amount of Federal income taxes it must pay, such adjustments are stated to constitute a part of the basic cost structure of the contract. In view of the expressed intent in the conference report that the contractor should be permitted to include the cost of Federal income taxes in the computation or adjustment of amounts to be paid by the AEC, it is my opinion that the adjustments for taxes permitted under these sections do not constitute direct reimbursement to the contractor for such taxes in contravention of section 165 of the Atomic Energy Act of 1954.

I am sure you will understand that this decision is limited to the legal questions discussed above and has no bearing on the necessity or desirability of the contract, which is for administrative determination. Also, as you may know, certain provisions of the proposed contract have been the subject of discussions between representatives of the Commission and of this office. These matters do not affect the question submitted by your letter and in the interest of expediting this decision, they have not been considered herein.

A copy of this letter is being sent to the Joint Committee on Atomic Energy.

Sincerely yours,

/s/

FRANK H. WEITZEL
Acting Comptroller General
of the United States

October 20, 1954

Honorable Lewis L. Strauss
Chairman, Atomic Energy Commission
Washington, D. C.

Dear Mr. Strauss:

In connection with the Commission's request of October 1, 1954, contained in Mr. Joseph Campbell's letter to me of that date as Acting Chairman of the Commission, the President has authorized me to furnish you with an opinion with respect to the validity of the proposed power contract between the Atomic Energy Commission and the Mississippi Valley Generating Company. I also have your letter of October 5, 1954, enclosing a copy of the October 1, 1954 proof of the contract and stating that it has been agreed between the parties to revise the last "Whereas" clause of the contract on page 3 to read as follows:

> WHEREAS, this contract is authorized by and executed pursuant to the Atomic Energy Act of 1954, for the purpose of providing electric utility service to the AEC, or to TVA in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the Project;

Mr. Campbell's letter states that the particular question as to which my opinion is desired relates to the authority of the Atomic Energy Commission to enter into the contract, with special reference to Sections 164 and 165.b of the Atomic Energy Act of 1954 (Public Law 703, 83d Congress, approved August 30, 1954). Section 164 deals with the authority of the Atomic Energy Commission to enter into long-term power contracts; Section 165.b prohibits the Commission in connection with any contract entered into under the authority of the Act from making direct payment or direct reimbursement of any Federal income tax on behalf of the contractor. Mr. Campbell, with his letter of October 1, has transmitted a copy of an opinion of the General Counsel of the Commission in which the General Counsel concludes that the Commission has the power and authority to execute the contract and that its provisions relating to Federal income tax are not in conflict with the requirements of Section 165.b, *supra*.

It appears that without a contract such as this, the Atomic Energy Commission as an agency of the United States might be required to exercise its rights as a priority customer under the Tennessee Valley Authority Act (16 U. S. C. § 831, *et seq.*) and demand from the Tennessee Valley Authority the amount of power to be developed by the plant to be erected pursuant to the contract. This would seriously affect the present customers of TVA now receiving that power.

I have examined the contract and it is my opinion that the Atomic Energy Commission's authority to execute it cannot be questioned and that none of its provisions offends Section 165.b of the Atomic Energy Act of 1954. As to the first question, it will be noted that the contract states at page 2 that it is predicated on a proposal whereby the Mississippi Valley Generating Company (the Company) will construct and own a generating station of a stated net capability (approximately 650,000 kilowatts) and will furnish 600,000 kilowatts (even though one unit in the generating station may be out of service) to the Atomic Energy Commission (AEC), "or to the Tennessee Valley Authority (herein called TVA) for account of the AEC in replacement of power furnished by TVA to the AEC." The contract further states in the

in replacement of electric utility service furnished to the AEC by TVA, in connection with the construction or operation of the Project." Section 1.09 (Article I, Definitions) defines the term "Project" as follows:

> Project shall mean the Oak Ridge installation, the Paducah installation, or the Portsmouth installation of the AEC or any other installation for which it may become lawful for the AEC to receive electric utility service under this contract.

Section 164 of the Atomic Energy Act of 1954 reads, so far as presently pertinent:

> ELECTRIC UTILITY CONTRACTS.—The [Atomic Energy] Commission is authorized in connection with the construction or operation of the Oak Ridge, Paducah, and Portsmouth installations of the Commission * * * to enter into new contracts * * * to provide for electric utility services for periods not exceeding twenty-five years, and such contracts shall be subject to termination by the Commission upon payment of cancellation costs as provided in such contracts * * *. The authority of the Commission under this section to enter into new contracts or modify or confirm existing contracts to provide for electric utility services includes, in case such electric utility services are to be furnished to the Commission by the Tennessee Valley Authority, authority to contract with any person to furnish electric utility services to the Tennessee Valley Authority in replacement thereof. * * *

The conference report on the bill which became the Atomic Energy Act of 1954 (H. R. 9757), explains that the last sentence in the above quotation was a Senate amendment and that it "authorized the Commission to enter into contracts to provide for replacement to the Tennessee Valley Authority of electric utility services furnished by TVA to the Commission in accordance with the basic authority * * *." H. Rept. No. 2666, 83d Cong., 2d Sess., p. 50. The "basic authority" referred to is that provided by Section 164. *Ibid.* I have no doubt that the contract, which specifically states as its purpose the providing of electric utility services to the Commission, or to TVA for the account of the Commission, in replacement of electric utility service furnished to the Commission by TVA in connection with the construction or operation of the Commission's installations at Oak Ridge, Paducah, or Portsmouth, is manifestly within the scope of the authority conferred upon the Commission by Section 164. It may be noted that under the language of Section 1.09 of the contract, defining the term "Project", it would be possible to extend the contract to installations of the Commission other than those at Oak Ridge, Paducah, and Portsmouth should such extension become lawful on some future occasion. It is plain, however, that a provision for future extension of the contract cannot affect its validity under existing law.

Section 165.b of the Atomic Energy Act of 1954 provides that "No contract entered into under the authority of this Act shall provide * * * for direct payment or direct reimbursement by the Commission of any Federal income taxes on behalf of any contractor performing such contract for profit." The conference report on the measure states with respect to the foregoing that "It was the intention * * * to prohibit the direct payment of Federal income taxes to contractors of the Commission, but it was not the intention * * * to bar inclusion of such taxes in the computation or adjustment of the base rate or cost structure of the Commission contract." H. Rept. No. 2666, *supra*, p. 50. I find nothing in the contract which, in my judgment, violates the prohibition of Section 165.b against direct payment or direct reimbursement by the Commission of Federal income taxes.

The provisions of the contract which appear to me to be of possible relevance in the consideration of Section 165.b appear in Sections 4.01 (p. 11), 4.03 (p. 12), 4.09 (p. 18), and 4.11 (p. 20). Section 4.01, in fixing the amount of the "Base Capacity Charge" at $9,052,050 per year, states that such charge takes into account certain cost factors including "costs with respect to federal income taxes". All of these costs are said to be "described or referred to in Appendix C" of the contract. That appendix discloses that in computing the costs included in the Base Capacity Charge the sum of $536,250 was assigned to the Federal income tax component of such costs, this on the basis of an assumed rate of retu

of 9 per cent on an equity capital of $5,500,000, or $495,000, in respect of which the applicab
under existing law, would be 52 per cent. The contract also shows in Appendix C that the
total investment is estimated at $107,250,000, and that the cost of the borrowed money [illegible]
is figured at 5.437 per cent, to take care of interest at 3½ per cent and the annual amortizatio
In this connection I am advised that it is anticipated that such amortization charges will be
offset by the annual charge for depreciation of the facilities. It would appear therefore th
Capacity Charge has been computed on the basis that the Company's net profit should not [illegible]
cent on its equity investment of $5,500,000. The provisions of Section 4.01, in my opinion
conflict with the requirements of Section 165.b and they are clearly within the intention [illegible]
as reflected in the conference report cited above, that it is appropriate to include the [illegible]
income taxes in the computation of the base rate structure of the contract. It is clear [illegible]
fixing the figure of $536,250 as the Federal income tax component of the Base Capacity [illegible]
suggest that the actual tax which the Company may be required to pay will necessarily be [illegible]

Nor can it be argued, in my opinion, that any of the provisions of the other sections referr
offend the requirements of Section 165.b. As has already been noted, the contract sets the Fed
tax component of the base rate structure at $536,250 initially. Paragraph 2 of Section 4.03
formula for adjustment of this component to reflect such changes as may occur with respect
mated tax rates. Section 4.09 recites that the rate structure will be sufficient to permit the
retire its indebtedness, in which regard it was assumed that the Company will be able to obtain
ruling authorizing it to deduct depreciation on a sinking fund basis. It is provided, however,
such a ruling not be obtained, the parties will agree to revise the rate structure so as to enable
pany to meet its debt retirement obligations. Finally, Section 4.11 establishes as part of the
structure of the contract a replacement reserve; AEC is required to make payments into this
amounts which, after deduction of any Federal income taxes that may be assessed on such pay
give the Company sufficient funds to enable it to make the replacements necessary to keep it
"a dependable and efficient operating condition." It is my opinion that none of these sectio
the requirements of Section 165.b and that they plainly comport with the intent of that Sect
as has been pointed out above, is to permit Federal income taxes to be included in the com
adjustment of the base rate or cost structure of the contract.

It should be expressly understood that this opinion does not consider in any manner quest
are within the jurisdiction of regulatory bodies, such as the Securities and Exchange Comm
Federal Power Commission and any state bodies, the approval of which may be required in
with the provisions of Section 8.15 of the contract.

Sincerely,

/s/ HERBERT BROWNELL, JR.
Attorney Gener

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

November 11, 1954

MISSISSIPPI VALLEY GENERATING COMPANY
P. O. Box 1376
West Memphis, Arkansas

Gentlemen:

This is with reference to the Power Contract No. AT-(40-1)-814 dated November 11, 1954, between your Company and the Atomic Energy Commission as amended by Supplement No. 1 dated November 11, 1954, the delivery of which is conditioned upon certain understandings contained in a letter dated November 11, 1954, from your Company to the Atomic Energy Commission and confirmed by the latter (the said Power Contract, Supplement thereto and letter concerning conditions of delivery being hereinafter referred to collectively as "the contract"). I wish to advise you that in my opinion the Atomic Energy Commission has power and authority to execute the proposed contract and the undertakings therein described and to obligate the United States of America for all payments which may be required to be made by the Atomic Energy Commission to your Company pursuant to any of the provisions of the proposed contract. It is further my opinion that Mr. Richard W. Cook, Acting Assistant General Manager for Manufacturing, and Mr. K. D. Nichols, General Manager, respectively, have full power and authority to execute and approve the contract on behalf of the Atomic Energy Commission and to make delivery thereof.

Sincerely yours,

WILLIAM MITCHELL

WILLIAM MITCHELL
General Counsel

B-120188

December 13, 1954

Honorable LEWIS L. STRAUSS, *Chairman*
Atomic Energy Commission
Washington 25, D. C.

Dear Mr. Chairman:

I have your letter of December 2, 1954, transmitting a copy of the contract with the Mississippi Valley Generating Company as revised since September 24, 1954, a copy of Supplement No. 1 thereto, and copies of other collateral documents pertaining to the contract.

Section 8.15 of the contract provides that the obligations of the parties thereunder shall be subject to:

> "* * * the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

In answer to your request of September 24, 1954, you were advised by decision B-120188, dated October 5, 1954, that the Atomic Energy Commission had authority to enter into the contract in the form then proposed, to obligate the United States to make payments as required by the contract, and to make payment of contract cancellation charges out of funds then or thereafter made available for expenditure to the Commission. You were also advised that the proposed contract did not contravene the prohibition against direct reimbursement of Federal income taxes contained in section 165 of the Atomic Energy Act of 1954.

In view of the revisions in and the supplement to the contract made since that time, and the execution of the other collateral documents, you request my opinion whether the Commission has authority to enter into the contract as presently constituted and to make or to obligate the United States to make the payments specified in section 8.15.

The changes made in the contract do not, in my opinion, affect the conclusion reached in my decision of October 5, 1954, that the Atomic Energy Commission has authority to execute the contract, to obligate the United States for all payments required to be made by the Commission under the contract, and to make payment of cancellation charges out of any funds available to the Commission for expenditure.

However, mention must be made of the provisions of section 7.09 which was added to the contract by Supplement No. 1. By this section the Atomic Energy Commission is given the right, at any time within three years after the contract becomes effective, to purchase the facilities from the Company. If this option to purchase is exercised,

> "* * * the Company will transfer to the AEC all right, title and interest of the Company in and to all property, real, personal or mixed, included in the Facilities contracted for or acquired for inclusion therein, and the contracts therefor, and the AEC shall assume all liabilities

then outstanding of every kind or nature theretofore incurred by the Company in connection with the acquisition or construction of the Facilities, including liabilities relating to debt securities of the Company, and shall indemnify the Company against all such liabilities. * * *"

Section 261 of the Atomic Energy Act of 1954 reads in part as follows:

"Sec. 261. Appropriations.—There are hereby authorized to be appropriated such sums as may be necessary and appropriate to carry out the provisions and purposes of this Act except such as may be necessary for acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion. * * *"

Thus, while section 164 of the Atomic Energy Act of 1954 provides expressly that "any appropriation presently or hereafter made available to the Commission shall be available for the payment of" cancellation costs provided for in long-term electric utility contracts authorized by that section, section 261 expressly refuses to authorize appropriations for acquisition of any real property, plant, or facility. Since the option to purchase under section 7.09 involves the acquisition of real property, it would appear necessary before such option could be exercised that an appropriation be available from which payments under section 7.09 could be made. Of course, if such an appropriation is available, there would be no doubt as to the authority of the Commission to assume the liabilities specified in section 7.09.

Sincerely yours,

/s/ Frank H. Weitzel
Acting Comptroller General
Of the United States

ATOMIC ENERGY COMMISSION

WASHINGTON 25, D. C.

December 2, 1954

Dear Mr. Comptroller General:

Since my letter of September 24, 1954, concerning the power contract which had been negotiated with the Mississippi Valley Generating Company and your reply of October 5, 1954, portions of the contract have been revised and it has been signed by the contracting parties. Revisions were made in the final "Whereas" recital, and in Sections 4.14 and 8.23 as indicated in the attached copy of the power contract. After the contract was signed, the contracting parties signed a letter to which was attached a memorandum, captioned "Memorandum Re Power Contract dated November 11, 1954, between AEC and Mississippi Valley Generating Company," which set forth the understanding of the contracting parties of the effect to be given to certain provisions of the contract. There was also executed Supplement No. 1 amending Sections 4.15, 7.08, 7.09 and 8.23 of the power contract. The power contract and Supplement No. 1 were signed and delivered on the conditions set forth in a letter agreement dated November 11, 1954. The reason for the conditions is explained in a letter from Mississippi Valley Generating Company dated November 11, 1954. By letter of the same date Mississippi Valley Generating Company advised the sponsoring companies, Middle South Utilities, Inc. and The Southern Company that it would terminate the power contract if the conditions set forth in the letter agreement with AEC dated November 11, 1954, did not occur prior to February 15, 1955, unless otherwise requested by the sponsoring companies. Finally, there has been executed a Letter Contract Number AT-(49-1)-815 between the sponsoring companies, Middle South Utilities, Inc. and The Southern Company, and the Atomic Energy Commission relative to the furnishing of power to the Commission in certain contingencies. Copies of the foregoing documents are attached. There is also attached a copy of a Memorandum of Understanding between Middle South Utilities, Inc. and The Southern Company dated August 10, 1954.

Section 8.15 of the power contract with Mississippi Valley Generating Company provides in part that "the obligations of the parties hereunder shall be subject to the following:

> * * * the receipt by the Company of an opinion of the Comptroller General of the United States to the effect that the AEC has power and authority to enter into this contract and to obligate the United States of America for all payments which may be required to be made by the AEC to the Company pursuant to any of the provisions hereof, and that the AEC has authority to pay cancellation costs under this contract out of any funds now or hereafter appropriated to it by Congress."

We are of the opinion that the Atomic Energy Commission has power and authority under the Atomic Energy Act of 1954 to execute this contract and the undertakings described therein and to obligate the United States of America for all payments which may be required to be made by the Atomic Energy Commission to the Mississipi Valley Generating Company pursuant to any of the provisions of the contract and that the persons who executed and delivered the contract on behalf of the AEC had

full power and authority to do so. However, in view of the revisions in the contract, since your recent review, and the execution of the supplemental and collateral documents mentioned above your opinion is again requested.

Sincerely yours,

Lewis L. Strauss
Chairman

Enclosures:

1. Contract No. AT-(49-1)-814
2. Letter dated 11/11/54 with attachment "Memorandum Re Power Contract dtd 11/11/54 between AEC and Mississippi Valley Generating Co."
3. Supplement No. 1 to Contract No. AT-(49-1)-814
4. Letter Agreement dated 11/11/54
5. Letter dtd 11/11/54 re Letter Agreement of 11/11/54
6. Letter Contract No. AT-(49-1)-815
7. Memorandum of Understanding dtd 8/10/54
8. Letter MVGC to Sponsoring Companies dtd 11/11/54

The Honorable
The Comptroller General
of the United States

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

January 6, 1955

MR. DANIEL JAMES
CAHILL, GORDON, REINDEL & OHL
63 Wall Street
New York 5, N. Y.

Subject: Contract between U. S. Atomic Energy Commission and Mississippi Valley Generating Company, No. AT-(49-1)-814

Dear Mr. James:

In response to the questions which you asked me the other day with respect to the above-entitled contract, I wish to advise you as follows.

It is my opinion that the interpretative memorandum attached to the letter of November 11, 1954, signed by Mr. Dixon and confirmed by Mr. Cook, constitutes an agreement between the Atomic Energy Commission and the Mississippi Valley Generating Company as to the interpretation of certain provisions of the contract which, to the extent not inconsistent with the contract, is binding upon the parties in accordance with its terms. As you may recall, I advised the Joint Committee on Atomic Energy substantially to this effect on November 11, 1954 (Hearings, pp. 610, 611).

With respect to the last sentence of Section 7.09, which was added by Supplement No. 1, it is my opinion that the reference in that sentence to another agency of the United States "thereunto duly authorized" refers to an agency which is duly authorized by applicable statute or regulation to bind the United States Government in accepting transfer of the facilities, making the payments, assuming the indebtedness, and indemnifying the Company, all as contemplated by that sentence.

Sincerely yours,

WILLIAM MITCHELL
WILLIAM MITCHELL

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1960.

United States, Petitioner, v. Mississippi Valley Generating Co., etc.	On Writ of Certiorari to the United States Court of Claims.

[January 9, 1961.]

Mr. Chief Justice Warren delivered the opinion of the Court.

We granted certiorari to review the decision of the Court of Claims because the conflict-of-interest problem presented by this case has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings.

The person with whose activities we are primarily concerned is one Adolphe H. Wenzell, Vice President and Director of First Boston Corporation[1] which is one of the major financial institutions in the country. At the suggestion of First Boston's Chairman, and subsequently at the request of the Bureau of the Budget, Wenzell undertook to advise the Government and act on its behalf in negotiations which culminated in a contract between the Government and the Mississippi Valley Generating Company (MVG), the respondent herein. The contract called for the construction and operation by the respondent of a $100,000,000 steam power plant in the Memphis, Tennessee, area. Ultimately, the plant was to supply 600,000 kw. of electrical energy for the use of the Atomic

[1] The positions held by the various individuals named in this opinion are those which were held at the time the transaction in question occurred.

Energy Commission (AEC). Before the plant was constructed, but after the respondent had taken some steps toward performing the contract, the AEC, which was the governmental contracting agency, canceled the contract because the power to be generated by the proposed plant was no longer needed. The respondent then sued the Government in the Court of Claims for the sums it had expended in connection with the contract.

The Government defended on several grounds, but primarily on the ground that the contract was unenforceable due to an illegal conflict of interest on the part of Wenzell. Specifically, the Government contended that at the time of Wenzell's employment by the Government, it was apparent that First Boston was likely to benefit, and as subsequently developed, in fact, did benefit, from the contract here in question; that Wenzell, as an officer of First Boston, was therefore "directly or indirectly" interested in the contract which he, as an agent of the Government, had helped to negotiate; that he consequently had violated the federal conflict-of-interest statute, 18 U. S. C. § 434;[2] and that his illegal conduct tainted the whole transaction and rendered the contract unenforceable.

A sharply divided Court of Claims rejected all of the Government's defenses and awarded damages to the respondent in the sum of $1,867,545.56.[3]

---

[2] The statute reads as follows:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[3] There were four opinions in the lower court. The principal one was written by Judge Madden of the Court of Claims, and it was joined by Judges Laramore of the Court of Claims and Bryan, United States District Judge sitting by assignment. Judge Bryan

Because of the view which we take of the conflict-of-interest question, it will not be necessary for us to determine the validity of the other defenses raised by the Government in the court below, important though they may be.[4] With regard to the conflict-of-interest defense, there appear to be but two legal principles involved: (1) Did the activities of Wenzell constitute a violation of 18 U. S. C. § 434; and (2) if so, does that fact alone preclude the respondent from enforcing the contract. For reasons which we shall set forth in detail below, we think that the Court of Claims was in error and that both of these questions must be answered in the affirmative.

I.

Because the outcome of this case depends largely upon an evaluation of Wenzell's activities on behalf of the Government, a rather detailed statement of the facts is necessary in order to understand fully the nature of those activities and to place them in their proper context. The voluminous evidence in the case was heard by a trial commissioner. Based upon the commissioner's report and the briefs and arguments of counsel, the Court of Claims made

---

also wrote a concurring opinion. Mr. Justice Reed (retired), sitting by assignment, wrote a dissenting opinion which was joined by Judge Jones, Chief Judge of the Court of Claims. Judge Jones also wrote a separate dissent.

[4] The other defenses raised by the Government were:

(1) That the AEC had not been authorized by the Atomic Energy Act of 1954 to make the contract;

(2) That the contract had not been placed before the Joint Committee on Atomic Energy in the manner required by the Atomic Energy Act;

(3) That the financing agreements required by the contract violated the Public Utility Holding Act of 1935;

(4) That the respondent had not obtained all of the regulatory approvals required for it to arrange the financing necessary for performance of the contract; and

(5) That the power contract was void for lack of mutuality.

very extensive findings of fact which cover approximately 200 pages in the transcript of record. Fortunately, it will not be necessary for us to consider the original evidence, since both parties have agreed to rely upon the Court of Claims' findings, and since we also conclude that those findings are sufficient to dispose of the issues presented. However, it should be noted that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them. See *United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586, 598; *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip. Co.*, 340 U. S. 147, 153–154.

First. At the outset, we think it is appropriate to discuss, in a general way, the origin of the contract here in question and the negotiations which led to the ultimate agreement. The story of this contract begins in the early days of 1953. Almost immediately after assuming office, President Eisenhower announced his intention to revise the Government's approach to the public power question. In his first State of the Union Message, delivered on February 2, 1953, the President indicated that it was his intention to encourage either private enterprise or local communities to provide power-generating sources in partnership with the Federal Government. Consonant with this policy, Joseph M. Dodge, Director of the Bureau of Budget, decided in the fall of 1953 to eliminate from the Tennessee Valley Authority's (TVA) budget for the fiscal year 1955 a request for funds to be used for the construction of a steam-generating plant at Fulton, Tennessee. The proposed TVA plant was to have served the commercial, industrial, and domestic power needs of the City of Memphis and its environs. When Gordon Clapp, the General Manager of TVA, learned of Dodge's decision, he immediately informed persons working in the Bureau of the Budget that if provision for the Fulton plant were

eliminated from TVA's budget, TVA would take the position that the amount of power then being supplied by TVA to the AEC should be reduced so that sufficient power would be available to meet the growing demands of TVA's other customers. As a result of this statement by Clapp, the Bureau of the Budget began drafting a statement for the President's budget message to the effect that steps would be taken to relieve TVA of some of its commitments to the AEC, and that if efforts in that direction proved unsuccessful, the possibility of the construction of a plant by TVA at Fulton would be reconsidered.

On December 2, 1953, Dodge met in his office with Lewis L. Strauss, Chairman of the AEC, and Walter J. Williams, General Manager of the AEC. Dodge said that he hoped to avoid further expenditures by TVA for the construction of power-generating plants, and that he thought the AEC should investigate the possibility of reducing its consumption of TVA-generated power by contracting with private industry for the construction of a plant that would supply 450,000 kw. of additional power for the AEC at its Paducah, Kentucky, installation by 1957. Dodge inquired whether the plan outlined by him would be feasible, and Williams replied that he could not answer the question until he had consulted with J. W. McAfee, the President of Electric Energy, Inc., a private utility company which had previously entered into long-term power contracts with the AEC similar to the one described by Dodge.

After the meeting, Williams arranged to meet with McAfee, and this meeting occurred on December 8, 1953. Williams asked McAfee whether he knew of a private power company that might be interested in building a plant to supply the AEC with as much as 450,000 kw. of generating capacity by the middle of 1957. McAfee stated that it might be difficult for his company to do the

job, but he agreed to make some inquiries about the matter. Later, on December 14, 1953, McAfee wrote a letter to the AEC indicating that he thought a group of private investors could be formed to supply the AEC the amount of power requested. Because of the Budget Bureau's continuing interest in the progress of the plan, a copy of McAfee's letter was requested by and sent to William F. McCandless, Assistant Director for Budget Review in the Bureau.

Sometime prior to December 14, 1953, Edgar H. Dixon, President of Middle South Utilities, learned from McAfee that the AEC might be seeking an additional source of power in the Paducah area. On December 23, 1953, Dixon came to Strauss' office for a meeting with Williams, Strauss, and Kenneth D. Nichols, who had been selected to succeed Williams as General Manager of the AEC. The purpose of the meeting was to discuss the possibility of having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to the AEC there. Shortly after the meeting had concluded, Williams called McCandless at the Bureau of the Budget to inform him of what had transpired at the meeting. On the next day, December 24, 1953, Rowland Hughes, Assistant Director of the Bureau of the Budget, wrote to Strauss, stating that it would be helpful if the AEC would continue negotiations with private power interests with a view toward reaching a firm agreement for the supply of power to the AEC at Paducah.

On January 4, 1954, McAfee wrote a letter to Williams in which he expressed some doubts about the plan suggested by the Government. He thought that it might be wiser for TVA to reduce its commitments to the numerous municipalities which it supplied with power, or for TVA to arrange with neighboring power companies to buy power from them. Shortly after Williams received this

letter, a meeting was held in Strauss' office, and those present were Strauss, Williams, Nichols, Hughes, and McCandless. Nichols, speaking for the AEC, expressed a certain reluctance to continue the negotiations. He pointed out that if the AEC purchased more power from private utilities in lieu of the power already being supplied by TVA, the cost to the AEC would be greater and the supply less certain because of possible delays in the construction of the plant and the location of reserve power. He also noted that McAfee was apparently no longer eager to enter into the contract; that from an engineering point of view, Paducah was a poor location for the site of the new plant; and that if more power was needed in the Memphis area, it would be better for the City of Memphis or for TVA to enter into a contract with private companies for the construction of a plant at that location. McCandless requested that the AEC pursue the matter at greater length with McAfee.

Pursuant to this request, a meeting was arranged for January 20, 1954, between McAfee and Dixon and representatives of the Budget Bureau and the AEC. At the meeting it was made clear to Dixon and McAfee that the purpose of the power plant was to relieve the pressure on TVA in the Memphis area by reducing its commitments to the AEC. The discussion therefore turned to the possibility of constructing the plant at Memphis rather than at Paducah. Dixon suggested that since the power would be supplied directly to TVA, it might be better for TVA, rather than for the AEC, to act as the contracting agency. However, the government representative preferred that the AEC contract and pay for the power, even though the actual delivery of power would be made to TVA. It was finally agreed that Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could supply 450,000 to 600,000 kw. of power in the Memphis area.

When it became apparent that the new plant was to be located at Memphis, McAfee lost interest in the project because the location was far removed from the pool area of the companies in which he was interested. Dixon therefore proceeded on his own to draft an initial proposal. During the period in which Dixon was preparing his proposal, he kept in close contact with several government officials, especially Wenzell. The nature and scope of these associations will be discussed below.

On February 19, 1954, Dixon met with Eugene A. Yates, Chairman of the Board of the Southern Company, a public utility holding company. Dixon's purpose in calling this meeting was to persuade Yates that Southern should join Middle South in building the proposed power plant. The next day Yates notified Hughes at the Bureau of the Budget and Nichols at the AEC that Southern had decided to join in the venture.

On February 25, 1954, Dixon and Yates (hereinafter referred to as the sponsors) submitted their proposal to the AEC. They offered to form a new corporation (MVG) which would finance and construct generating facilities from which 600,000 kw. of electrical power would be delivered to TVA in the Memphis area for the account of the AEC. We do not think it is necessary to relate the details of the proposal. Suffice it to say that after a comprehensive joint analysis by TVA and the AEC, the Government decided that the cost estimates contained in the proposal were too high. In fact, the analysis showed that the proposal would cost over seven million dollars more per year than the proposed TVA plant at Fulton would have cost. At the sponsors' request, another analysis was made by Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission. Adams confirmed the conclusions of the AEC and TVA, and said that the figures in the proposal were much higher than a reasonable estimate of costs to the sponsors should require.

By March 24, 1954, it became apparent to the sponsors that their initial proposal was unacceptable to the Government. Therefore, they worked from March 26 to April 1, 1954, to draft a proposal which would be more agreeable to the Government. This second proposal was ultimately submitted to the AEC on April 12, 1954. An intensive joint analysis was again made by the AEC and TVA. Although the findings of fact do not specifically indicate wherein the second proposal differed from the first, the second proposal was more to the Government's liking, and the analysts suggested that it could be a basis for the negotiation of a final contract. On April 24, 1954, Hughes sent President Eisenhower a memorandum reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct the AEC to conclude a final agreement. On June 16, 1954, the President authorized AEC to continue negotiations with the sponsors and to attempt to consummate an agreement based generally upon the terms of the second proposal.

The negotiation of the final contract began on July 7, 1954, and concluded with the signing of the contract on November 11, 1954. The Government was represented by a "competent and aggressive staff of negotiators."[5] Although the final contract was slightly different from the second proposal, in a general way, it was within the terms of that proposal. The contract became effective on December 17, 1954.

In June 1955, after the respondent had taken some preliminary steps toward performance of the contract,[6] the

[5] Any quoted material in the statement of facts is taken from the Court of Claims' findings of fact.

[6] Those steps consisted of undertaking initial action toward financing the project, attempting to obtain the regulatory approvals required under the terms of the contract, taking options on land which was to be the site of the plant, and letting some of the basic construction contracts.

sponsors learned that President Eisenhower had requested the Bureau of the Budget, the AEC and TVA to consider whether the contract should be terminated because in the interim the City of Memphis had decided to construct a municipal power plant, thereby obviating the need in that area for TVA-generated power. On July 11, 1955, the sponsors were informed by the Chairman of the AEC that the President of the United States had decided to terminate the contract. During the months that followed, representatives of the sponsors and of the AEC attempted to agree upon a mutually acceptable basis for terminating the contract. On November 23, 1955, after protracted congressional debate concerning the propriety of Wenzell's activities on behalf of the Budget Bureau, the AEC advised the sponsors that, upon the advice of its counsel, it had reached the conclusion that the contract was not an obligation which could be recognized by the Government. This suit for damages was then initiated.

Second. Having sketched the general background of this litigation, we think it is now appropriate to set forth in some detail a description of Wenzell's connection with the Government and of the role he played in the negotiations, for it is these activities on behalf of the Government, as well as his affiliation with First Boston, which constitute the basis for the Government's assertion of a conflict of interest.

Wenzell's first contact with the Government actually antedates any of the negotiations relating to the contract here in question. However, his earlier association with the Government does have a bearing on the issues with which we are primarily concerned, and we shall therefore advert briefly to that phase of Wenzell's activities. In May 1953, George D. Woods, Chairman of First Boston, met with Dodge at the latter's office in the Bureau of the Budget. Woods expressed his agreement with the Administration's newly announced policy of reducing the

Government's participation in business activities, and he offered the services of himself and his firm in any way that might help to achieve the Administration's objective. Dodge replied that he was interested in having some studies made on the amount of subsidy that TVA was receiving from the Federal Government. Dodge indicated that he had not been able to find the right person to conduct these studies, and he asked Woods if he could suggest someone. Woods replied that First Boston did have a man who had worked on many utility financing transactions and who would be qualified to do the work described by Dodge. The man referred to was Wenzell. Woods promised that he would endeavor to make Wenzell's services available for the special project described by Dodge. At the time, Wenzell was a vice president of First Boston and one of its directors. He had been with the firm since its inception in 1934 and before that with its predecessor since 1923. He owned stock in First Boston, although the stock was in his wife's name.

Upon returning to New York, Woods conferred with Wenzell and with other executives of First Boston. Wenzell indicated his willingness to take the job, and none of the other men consulted had any objection. A meeting between Dodge and Wenzell was therefore arranged for May 15, 1953. At the meeting it was agreed that Wenzell would serve as a part-time consultant to the Bureau, spending one or two days a week in Washington until the project was completed. Wenzell was to receive no compensation from the Government, but he was to be given $10 per day in lieu of subsistence plus transportation expenses. It was understood that he would neither resign his position with First Boston nor relinquish any part of his regular salary or yearly bonus based on the business which he brought to the firm.

Wenzell's task was to make a financial analysis of TVA for the purpose of estimating the amount and source of the

subsidy given to TVA by the Government. Wenzell began his work for the Bureau on May 20, 1953, and his final report was submitted on September 20, 1953. During his four months with the Government, Wenzell was made privy to a vast quantity of data, much of it confidential, contained in the TVA files. Wenzell's final report was generally favorable toward TVA's technical operations, although it suggested that some of TVA's internal accounting systems should be revised and that its service area should not be expanded. The report also contained many unsolicited recommendations to the effect that future demands for power in areas supplied by TVA should be met by private or municipal power plants rather than by an expansion of TVA's facilities. When the report was delivered to Dodge, he read it briefly and was surprised to see that Wenzell had included in the report these recommendations, which had not been requested. Subsequently, after Wenzell had severed his connection with the Bureau, he showed a copy of his report to Woods, although Dodge had expressly admonished Wenzell that the report was a confidential document and should be shown to no one.

Wenzell's next contact with the Government came in January 1954, shortly after the Bureau had commenced the above-described preliminary negotiations with McAfee and Dixon. At the request of Hughes, Wenzell came to Washington on January 18, 1954, to confer on the possibility of his returning to the Bureau on a part-time basis to assist in the negotiations with Dixon. The decision to call upon Wenzell's talents was made by Dodge and Hughes, for it was thought that Wenzell's knowledge of TVA, based upon the analysis theretofore made by him, and of commercial transactions generally would be of great value during the negotiations. At the meeting, Hughes informed Wenzell of the Government's intention to arrange for the construction of a privately owned

power plant near Memphis. Wenzell was also told about the exploratory negotiations which had taken place in December 1953 between the AEC and McAfee and Dixon. Wenzell's chief responsibility was to act as a consultant in the technical area of interest costs for any financing that would have to be undertaken in connection with the contract. Again, as in 1953, Wenzell was not asked to sever his connection with First Boston, and he did not do so. At the close of the meeting, Wenzell informed Hughes that he knew both Dixon and McAfee and that in 1948, or 1949, he had talked to Dixon in connection with services that First Boston proposed to render to one of Dixon's companies. Hughes asked Wenzell to attend a forthcoming meeting between the AEC and Dixon and McAfee. "Hughes emphasized the need for great speed on the project," and he asked Wenzell "to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter."

At the request of Hughes, Wenzell went to the AEC on the afternoon of January 18, 1954, to confer with Strauss. Strauss acquainted Wenzell with the purpose of the meeting scheduled for January 20, and impressed upon Wenzell the necessity for prompt action. On the following day, Wenzell called Dixon and told him that he would be present at the January 20 meeting as a representative of the Budget Bureau and that Dixon should not be surprised when he saw Wenzell at the meeting.

As prearranged, Wenzell attended the January 20 meeting, and he was the only representative of the Budget Bureau there. However, he did not come to the meeting unescorted. "On his own volition and without consulting any representative of the . . . [Government] or of First Boston, Wenzell took with him Paul Miller an assistant in First Boston's buying department." The meeting lasted for several hours and the drift of the discussion has been

described above. At the close of the meeting, Dixon said that he would begin investigating the feasibility of the type of contract desired by the Government, and it was agreed that Wenzell would talk to Tony Seal of Ebasco, an engineering firm which serviced Dixon's projects.

Wenzell returned to New York after the meeting, but before he left, Hughes "requested Wenzell to stay in touch with Dixon and his associates on the development of a proposal and particularly to help point up the real cost of money to be used in financing the project." On January 21, 1954, Wenzell conferred with Seal. He informed Seal of what had happened in Washington and instructed him to begin a study of the proposed project. Seal met with Wenzell again on January 27, 1954, and the former described his progress on the study he was making. "Wenzell stated that he was at . . . [Seal's] service as a representative of the Bureau of the Budget on the all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant."

Wenzell went to Washington on February 4, 1954, to inform Hughes of what had transpired at his meetings with Seal. He met Dixon in Washington, and the two men flew to New York together that evening. During the flight, Dixon "asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a project similar to the OVEC project." [7]

[7] OVEC stands for the Ohio Valley Electric Corporation, which is a generating company composed of several private utility companies. In 1952, OVEC had contracted with the AEC to supply it with power at its Portsmouth, Ohio, installation. The Portsmouth project required a large amount of financing, and First Boston had been retained to handle the arrangements. First Boston was still engaged in its Portsmouth undertaking when Wenzell first came to the Bureau of the Budget in 1953.

On February 5, 1954, Wenzell met with other executives of First Boston in an attempt to obtain the information requested by Dixon. After Wenzell thought he had found the answer to Dixon's question, he called Dixon and advised him of the information he had acquired from his colleagues at First Boston. During the week that followed, Wenzell made further studies and engrafted certain refinements onto his calculations. Then, on February 14, 1954, he attended a meeting in Dixon's office and gave Dixon the new figures which he had computed.

After McAfee dropped out of the negotiations because of the proposed site of the new plant, Dixon began to search out support from other quarters. One of those from whom he sought assistance was Yates. Dixon arranged a meeting with Yates on February 19, and he requested Wenzell, who had known Yates for several years, to be present. The meeting occurred as scheduled, and Wenzell was the only representative of the Government present. As indicated, Yates agreed to join the project on February 20, 1954.

During his next trip to Washington on February 23, 1954, Wenzell drafted a letter to Dixon giving his opinion as to the cost of money. The information in this letter conformed to the oral opinion which Wenzell had rendered on February 14, 1954. The letter was on First Boston stationery and was signed by Wenzell as an officer of First Boston. Two days later, on February 25, 1954, the sponsors submitted their first proposal. The proposal contained only one reference to the cost of money, and that paragraph read as follows:

> "We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions; and our offer is conditioned upon such consummation."

The "responsible financial specialists" upon which the sponsors relied were Wenzell and his colleagues at First Boston, and the cost data upon which they conditioned their proposal was that which was contained in the opinion letter drafted by Wenzell.

Wenzell did not participate in the initial study of the sponsors' proposal, but on March 1, 1954, he attended a Budget Bureau staff meeting which had been called for the purpose of completing the review of the proposal. Wenzell brought with him to this meeting Powell Robinson, an assistant vice president of First Boston's sales department. Wenzell, who by March 1 had completed his function as a consultant on the cost of money, now assumed the role of a consultant on the total cost of the project. His initial reaction was that the cost estimates contained in the first proposal were too high. When it became apparent that Wenzell could not answer all of the technical questions relating to engineering costs, Wenzell decided to call Seal down from New York. Seal arrived on the following day and the meeting was continued. As it turned out, Seal was also unable to answer all the questions asked by staff members, and Hughes was advised that, despite Wenzell's insight into the problem, there still remained areas of uncertainty. It was then suggested by a staff member that a joint AEC–TVA analysis be made. Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made.

On March 9, 1954, a meeting took place at the Bureau of the Budget. The joint AEC–TVA analysis was discussed, and it was the view of all present that the cost estimates were too high. Wenzell was therefore instructed to inform Seal that the sponsors should try to submit a more acceptable proposal. Wenzell conveyed the information to Seal as requested. On the next day, Wenzell arranged a meeting between Duncan Linsley, the Chairman of First Boston's Executive Committee, and

the sponsors. Dixon had requested the meeting so that he could confirm with a reliable source the cost-of-money information previously given him by Wenzell.

On March 15, Wenzell participated in another Budget Bureau meeting which had been called to discuss the final AEC–TVA analysis. In addition to Wenzell, those present at the meeting were the sponsors and Dodge. The sponsors requested that an independent analysis of the proposal be made, and Wenzell suggested that Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission, be requested to make the analysis. As indicated above, this suggestion was subsequently adopted.

On March 16, 1954, several representatives of the sponsors met in Dixon's hotel room to draft a letter replying to the unfavorable conclusions contained in the AEC–TVA analysis. The evidence does not clearly demonstrate whether or not Wenzell was present at this meeting, but the Court of Claims found that Wenzell saw the letter and made several changes on it for the sponsors in his own handwriting. The letter was never sent to the AEC.

On March 23, 1954, Wenzell met with Adams and conferred with him on the proposal and the analysis which Adams was making. While Adams was preparing his analysis, the sponsors were working on some revised estimates. A meeting was called at the Budget Bureau for April 3, 1954, to discuss both Adams' analysis and the sponsors' new estimates. At the meeting, Wenzell once again confirmed the information he had previously given the sponsors on the cost of money. At the conclusion of the meeting, it was decided that the sponsors should undertake to prepare a new proposal in line with their revised estimates. On the afternoon of April 3, Wenzell saw Nichols of the AEC, who said that the sponsors' most recent estimates might prove acceptable. "He suggested that Wenzell encourage the sponsors to refine their figures."

April 3 was the last time that Wenzell came to Washington in his capacity as a consultant to the Bureau. However, the sponsors consulted him from time to time in the preparation of their second proposal, which was dated April 10, 1954, and was submitted to the AEC on April 12, 1954. Wenzell reconfirmed the information which he had previously given the sponsors on the cost of money, and "this information was relied upon by the sponsors in the drafting of the second proposal." The second proposal, like the first, contained a paragraph indicating that the sponsors relied upon Wenzell's advice and conditioned their offer on that advice.

Wenzell took no part in the final negotiations which led to a formal contract based upon the second proposal. The Court of Claims found that Wenzell terminated his association with the Bureau on April 3, 1954; however, Wenzell felt that his relationship with the Bureau ended on the date of the sponsors' second proposal, April 10, 1954. The findings show that Wenzell received a telephone call from Dixon regarding the second proposal as late as April 10, 1954, and that McCandless and Wenzell also had a telephone conversation on that date. Wenzell never tendered either an oral or written resignation; he merely stopped working on behalf of the Bureau.[8]

Third. The findings of the Court of Claims make it perfectly clear that the conflict-of-interest question in the case arose many months prior to the time at which the

[8] In our rehearsal of the facts, we have necessarily omitted mention of numerous inconsequential meetings and telephone conversations between Wenzell and representatives of the Government and of the sponsors. We make this fact known only to complete the picture and to indicate that Wenzell was continuously involved in the negotiations during his tenure with the Bureau of the Budget. It should also be noted that Hughes was aware of most of Wenzell's activities, both those which we have described and those which we have not mentioned in detail.

Government concluded that the contract was unenforceable. Those who first showed concern about the duality of Wenzell's interests were the sponsors themselves. Around February 20, 1954, Dixon's counsel, Daniel James, expressed apprehension about the fact that Wenzell was an officer of First Boston and was also an employee of the Budget Bureau. "James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project. Therefore, James told Dixon that since Wenzell was an officer of First Boston and was also employed by the Budget Bureau, a difficult situation might be created if Dixon should subsequently ask First Boston to handle the financing of the project." James thought that the public power advocates would "make it appear that there was a taint of illegality" attached to the project. As a result of his discussion with James, Dixon later spoke to Wenzell about the "embarrassment" that might result if First Boston were to be retained as financial agent. Dixon suggested that Wenzell talk to his superiors at the Budget Bureau about the situation.

On February 23, 1954, Wenzell followed Dixon's advice and spoke to Hughes about the matter of duality. He alluded to the fact that he had given the sponsors an opinion letter on the probable cost of money for financing the project, and that First Boston was the source of the information given to the sponsors. "He then pointed out to Hughes that if it later developed that First Boston should be asked to handle the financing for the sponsors and should give them a letter similar to Wenzell's draft, the fact that he had been the instrumentality for obtaining the interest figure from First Boston, had given the figure to the sponsors, and had used the same figure in his draft could cause criticism against and embarrassment to the Administration, in that it could be charged

that he, as a First Boston officer and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston." Hughes replied that he thought Wenzell was exaggerating the problem, but he nevertheless advised Wenzell to discuss the matter with his associates at First Boston, with his counsel, and ultimately with Dodge.

Wenzell returned to New York on February 23, 1954, and spoke to James Coggeshall, President of First Boston. Coggeshall thought that the matter was important and suggested that First Boston's counsel, Sullivan and Cromwell, be consulted. Arthur Dean, the partner in the firm, who generally handled First Boston's business, was leaving town, and he suggested that Wenzell see John Raben, another member of the law firm. On February 26, 1954, Wenzell met with Raben and described the activities in which he had engaged on behalf of the Budget Bureau. "Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. He also advised that if the proposal was later accepted and First Boston was requested to handle the financing, the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee. Finally, he told Wenzell that he should keep Dodge and Hughes informed about any developments in the matter, including any decision which First Boston might later make as to handling the financing of the project." On the same day Raben telephoned Dean, who confirmed the advice which Raben had given Wenzell.

During the days that followed, Wenzell, in conversation, recognized the danger of his dual position, but he did not resign, as he had been advised to do. On one occasion, he was describing his uneasiness to one of his coworkers at the Budget Bureau, and his colleague said

that he thought Wenzell "was 'working both sides of the street' and was likely to get in serious trouble. He suggested that Wenzell's actions were attributable to his lack of familiarity with the restrictions applicable to Government employees as compared with practices in private business." On another occasion in early March 1954, Wenzell told other associates at the Bureau that "he felt that he was in an awkward position in connection with his work on the sponsors' proposal." Then, on March 9, 1954, Wenzell spoke to Dodge about his problem. "Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible."

In the meantime, both James and Dixon learned that Wenzell had been advised by his counsel to resign immediately. When in early March 1954, James learned that Wenzell had not yet resigned, he asked Hughes why Wenzell had been permitted to continue as a consultant to the Bureau. James expressed the same fears to Hughes that he had earlier expressed to Dixon.

On March 3, 1954, Raben called Wenzell to find out whether the latter had resigned. Wenzell said that he had not resigned, but he assured Raben that he was in the process of doing so. Dean then telephoned Wenzell and told him "to resign promptly and in writing." Dean's concern continued, and on March 10, 1954, he told Raben to call Wenzell again to find out whether he had resigned. Wenzell indicated that he had not as yet resigned, but that he would do so immediately. Consequently, Raben took no further action on the matter. However, as indicated, Wenzell never resigned and did not cease to act for the Bureau until approximately the date on which the second proposal was submitted.

Fourth. The final set of facts with which we are concerned relates to the retention of First Boston as the

financing agent for the project. On April 12, 1954, the day on which the second proposal was submitted to the Government, the sponsors met with numerous executives of First Boston, among whom was Wenzell. The sponsors requested a letter confirming Wenzell's information on interest costs. First Boston was also asked to prepare a memorandum on what it thought would be a proper financial plan for the project. At this meeting, Wenzell had discarded his Budget Bureau hat, and had resumed his role as a First Boston vice president. By the time of the meeting, Wenzell "expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from" the second proposal.

About the middle of April 1954, an executive at Lehman Brothers, another major investment banking firm, learned of the possibility of a contract between the sponsors and the Government. Lehman Brothers thereupon notified the sponsors that it wished to be considered in connection with the financing of the project. Subsequently, in May 1954, Dixon told Woods that if First Boston was to arrange for the financing, it would probably be a good idea for Lehman Brothers also to be associated with the project. Woods was very cool to the idea of Lehman Brothers' participation, and he indicated that he would have to consult his colleagues about it.

On May 11, 1954, Woods told Dixon that First Boston did not wish to share the financing arrangements with Lehman Brothers, and that it might be better for First Boston to withdraw from the project. However, said Woods, if Dixon did not want Lehman Brothers to handle the financing alone, First Boston would be willing to associate with Lehman Brothers "on the condition that First Boston would have the dominant position so far as authority was concerned and would also have the senior position with respect to advertising and the division of fees." Woods pointed out that in the financial business senior

position as to advertising was a matter of great importance. He felt that First Boston would achieve great prestige were it to arrange for the financing of the project, and that as a result of its activities First Boston would probably receive other business of the same kind.

Thereafter, First Boston, having already given Dixon a letter confirming Wenzell's information on interest costs, began to prepare a plan for the debt financing. Although Wenzell was not directly responsible for the preparation of the plan, he did assist those who were drafting it. At a meeting on May 18, 1954, the final draft plan for the financing of the project was discussed by the sponsors, First Boston, and Lehman Brothers. The plan called for the direct placement of up to $93,000,000 worth of bonds and up to $27,000,000 worth of unsecured notes. The plan was approved, and it was also decided "that the fee for the financial agents would be divided on the basis of 60 per cent to First Boston and 40 per cent to Lehman Brothers and that First Boston would have preferred position on any advertising."

Since no formal agreement of retainer was ever signed, it is difficult to pinpoint the date on which First Boston was actually retained. However, Dixon believed that First Boston had been retained on April 12, when it had been asked to prepare an opinion letter and a memorandum on procedures to be used in financing the project.

Some time in late May 1954, Woods decided that it would be better for First Boston not to charge a fee for its services. The executive committee of First Boston tentatively decided not to accept a fee on July 1, 1954, and that position was formally adopted on October 21, 1954. "The decision not to charge a fee was based on Woods' conclusion that the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget

Bureau to assist the Administration in connection with its power policy, and that First Boston should not charge a fee for assistance in obtaining funds that were designed to obviate the necessity of Federal expenditures for the expansion of TVA."

As of February 18, 1955, First Boston had made no formal announcement of its decision not to charge a fee; nor had it notified the Government concerning the decision. On that date, Senator Lister Hill of Alabama made a speech criticizing the activities of Wenzell and First Boston and emphasizing Wenzell's conflict of interest. On the next day, Woods released a statement to the press indicating that neither Wenzell nor First Boston had received or would receive any fee for the services rendered in connection with the project. Lehman Brothers had previously indicated that it thought some fee should be charged, and when Woods released the press statement, representatives of Lehman Brothers were upset because they had not been consulted first. Although Dixon had heard that First Boston was contemplating not charging a fee, he did not understand that a final decision on that subject had been made. Even as late as May 5, 1955, Dixon told First Boston that he anticipated questions from the SEC regarding First Boston's fee, and he requested that First Boston give him a clear statement on the matter. In response to this request, First Boston gave Dixon a letter indicating that it would take no fee for the financing services to be rendered in connection with the project. "Dixon was surprised by First Boston's decision not to accept a fee for its services as financial agent. The decision was unusual and without precedent in the history of First Boston." Finally, on May 11, 1955, Lehman Brothers decided that, in view of First Boston's decision, it would also agree not to charge a fee.

101 Cong. Rec. 1714.

Despite the fact that Wenzell had earlier promised to inform Dodge of any agreements between First Boston and the sponsors and to submit those agreements to the Budget Bureau for approval, and despite the fact that First Boston's counsel had advised Wenzell to inform the Budget Bureau of any such agreements, neither Wenzell nor anyone connected with First Boston informed the Budget Bureau of First Boston's retention by the sponsors. The Bureau of the Budget did not learn of First Boston's retention until February 18, 1955. The AEC was informed on July 7, 1954, that First Boston and Lehman Brothers were acting as financial agents for the sponsors. However, "there is no evidence that any representative of AEC had knowledge up to . . . [December 1954] that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project."

II.

As is apparent from a recitation of the facts, this case touches upon numerous matters with which we are not concerned. Therefore, at the outset, we think it is important not only to delineate the issues upon which our decision turns, but also to specify those collateral issues which are not pertinent to our decision. As already indicated, we are interested only in whether Wenzell's executive position with First Boston and his simultaneous activities on behalf of the Government constituted an illegal conflict of interest; and if so, whether the conflict of interest rendered the contract unenforceable. In reaching our decision on these questions, we do not consider and have no interest in the following matters:

(1) The policy of the Administration concerning the relative merits of public, versus private power development;

(2) The desire of the respondent and Wenzell and his corporate associates to advance the policies of the Administration;

(3) The employment of so-called "dollar-a-year" men, such as Wenzell, to advise the Government in matters of business, industry, labor, and the sciences; and

(4) The reasonableness or unreasonableness of the contract ultimately negotiated, that not being an issue in the case, and there being no burden on the Government to establish financial loss.

First. In determining whether Wenzell's activities fall within the proscription of Section 434, we think it is appropriate to focus our attention initially on the origin, purpose, and scope of the statute. Section 434 is one of several penal conflict-of-interest statutes which were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public.[10] It is a restatement of a statute adopted in 1863 following the disclosure by a House Committee of scandalous corruption on the part of government agents whose job it was to procure war materials for the Union armies during the Civil War.[11] The statute has since been re-enacted on several occasions,[12] and the broad prohibition contained in the original statute has been retained throughout the years.

The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. *United States* v. *Chemical*

---

[10] The other statutes are 18 U. S. C. §§ 216, 281, 283, 284, 1914.

[11] Act of March 2, 1863, c. 67, § 8, 12 Stat. 696, 698. See H. R. Rep. No. 2, 37th Cong., 2d Sess., Government Contracts and Appendix.

[12] R. S. § 1783; Act of March 4, 1909, c. 321, § 41, 35 Stat. 1097; Act of June 25, 1948, 62 Stat. 703.

Foundation, 272 U. S. 1, 18. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, *Matt.* 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service, or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes.[13] Rather, it applies, without exception, to "whoever" is "directly or indirectly interested in the pecuniary profits or contracts" of a business entity with which he transacts any business "as an officer or agent of the United States."

It is also significant, we think, that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To

[13] See, *e. g.*, 18 U. S. C. §§ 431–433; 15 U. S. C. §§ 1, 13; 13c.

this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation."[14] *Rankin* v. *United States*, 98 Ct. Cl. 357.

While recognizing that the statute speaks in broad, absolute terms, the respondent argues that to interpret the statute as laying down a prophylactic rule which ignores the actual consequences of proscribed action would be a violation of the time-honored canon that penal statutes are to be narrowly construed. But even penal statutes must be "given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U. S. 540, 552; *Rainwater* v. *United States*, 356 U. S. 590, 593; *United States* v. *Corbett*, 215 U. S. 233, 242. In view of the statute's evident purpose and its com-

[14] The preventive nature of conflict-of-interest statutes was ably described by the Court of Claims in *Michigan Steel Box Co.* v. *United States*, 49 Ct. Cl. 421, 439:

"The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them. . . ."

We have taken a similar view of the evils which flow from contingent fee arrangements for obtaining government contracts. In *Hazelton* v. *Sheckells*, 202 U. S. 71, 79, we said: "The objection to them rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear." See also *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 275; *Tool Co.* v. *Norris*, 69 U. S. (2 Wall.) 45, 55.

prehensive language, we are convinced that Congress intended to establish a rigid rule of conduct which, as we shall now demonstrate by analyzing each of the elements of the statutory prohibition, was violated by Wenzell.

The first question is whether Wenzell acted as an "officer or agent of the United States for the transaction of business." Judged by any reasonable test, the facts which we have recited above demonstrate that he was the Government's key representative in the crucial preliminary negotiations between the Government and the sponsors. Because Wenzell was a business acquaintance of both Dixon and Yates, Hughes very early in the negotiations assigned Wenzell the task of using "such influence as he had with the private utility people to impress upon them the need for prompt action." In the weeks that followed, Wenzell kept in constant touch with the sponsors, and frequently was the only representative of the Government at important meetings concerning the project. He participated in intragovernmental analyses; he supplied the sponsors with vital information on the cost of money, and that information was subsequently made the basis for the sponsors' proposals; he urged the sponsors to refine their figures after the initial proposal was rejected; he was used by the Budget Bureau not only as a consultant on the cost of money, but also as an advisor on the total cost of the project. In fact, Wenzell's activities were so extensive that the Court of Claims was led to the conclusion that "Hughes really used Wenzell as an expediter. . . . He [Wenzell], no doubt, was able to give to Hughes a better overall view of events than any other person, and did, we should suppose, expedite the formulation of the proposal which formed the basis for the later negotiation of details and exact figures." — Ct. Cl. —. Considering that Wenzell was the Government's major representative in the formative negotiations of this multimillion dollar contract, we think it

would be unrealistic to say that he was not the type of "agent" to whom Section 434 was intended to apply.

The respondent suggests that Wenzell was not an "agent of the United States" because "he took no oath of office; he had no tenure; he served without salary, except for $10 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary and were not prescribed by statute; and he was permitted to continue in his position as one of the vice presidents of First Boston and to draw his salary from that company." But surely, these factors cannot be determinative of the question. A key representative of the Government who has taken no oath of office, who has no tenure, and who receives no salary is just as likely to subordinate the Government's interest to his own as is a regular, full-time, compensated civil servant. This is undoubtedly why the statute applies not only to those who are "employed" by the Government, but also to "whoever . . . acts" as an agent for the Government.[45] In addition, we think that the respondent ignores the relevant facts when it characterizes Wenzell's activities as merely "occasional and temporary." During his association with the Budget Bureau, Wenzell, as we have indicated, was as active a participant in the negotiations as anyone connected with the project. We do not think it would be erroneous to characterize him as the real architect of the final contract. Finally, respondent's reliance upon the fact that Wenzell retained his position with First Boston is misplaced. The key role which Wenzell played in representing the Government was in no way diminished by the fact that he retained his association with First Boston during his period of consultancy. It was Wenzell's position with

[45] Irregular employees of the Government, whether compensated or not, have always been considered by the Executive Branch to be subject to the conflict-of-interest statutes. See, *e. g.*, 40 Ops. Att'y Gen. 168, 289, 294; 41 Ops. Att'y Gen. No. 64.

First Boston which constituted the [illegible]sis for his conflict of interest, and it would truly be anomalous if we were to adopt the respondent's suggestion that the very fact which creates the conflict of interest also operates to remove Wenzell from the coverage of the statute. This would ignore the purpose of the statute.

The respondent also contends that even if Wenzell qualified as an "agent" of the Government his activities did not constitute "the transaction of business." We disagree. Although it is true that Wenzell had no authority to sign a binding contract, and that he did not participate in the terminal negotiations which led to the final agreement, nevertheless, those facts do not support the respondent's conclusion that the negotiations in which Wenzell participated were too remote and tenuous to be considered "the transaction of business." Far from being tenuous, the negotiations in which he participated were the very foundation upon which the final contract was based. As the findings of the Court of Claims demonstrate, the preliminary negotiations with which Wenzell was concerned dealt primarily with the cost of the project, and particularly with the "all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant." If the sponsors and the Government had not agreed on the cost of construction and on the cost of money, no contract would have been made, because the cost of power supplied to the AEC was to have been based upon both of those factors. As the Court of Claims found: "It is well known that the cost of money played an important part in the cost of the entire project and in the price at which the energy could be produced and sold. . . . It was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and . . . the cost of money is the largest component of cost included in the capacity charge." The importance of the negotiations between Wenzell and the sponsors is

emphasized by the fact that both the first and second proposals were conditioned upon the sponsors' being able to borrow money at the interest rate specified by Wenzell and First Boston. Although Wenzell did not participate in the ultimate negotiations, those negotiations cannot be divorced from the events which led up to the submission of the second proposal. The final contract was not negotiated in a vacuum. The second proposal, upon which Wenzell had expended so much time and energy, constituted both the framework and the guidelines of the final contract. And although "there were numerous changes in and additions to the terms set forth in the proposal," the Court of Claims specifically found that "[i]n a general way, the contract was within the terms of the proposal."

We therefore think that the respondent unrealistically assesses the facts when it characterizes the negotiations which led to the contract as a series of disconnected transactions. On the contrary, they were a continuous course of dealings which were closely interrelated and interconnected. Wenzell played a key role in the early stages of the negotiations, and it was quite likely that the contract would never have come into fruition had he not participated on behalf of the Government. The Court of Claims recognized the importance of the preliminary negotiations and of Wenzell's activities during those negotiations. It said that "[w]hile the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work." — Ct. Cl. —. If the activities of a government agent have as decisive an effect upon the outcome of a transaction as Wenzell's activities were said by the Court of Claims to have had in this case, then a refusal to characterize those activities as part of a business transaction merely because they occurred at an early stage of the negotiations is at war with the obvious purpose of the statute. To limit the application of the stat-

ute to government agents who participate only in the final formation of a contract would permit those who have a conflict of interest to engage in the preliminary, but often crucial stages of the transaction, and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often perfunctory stage of the proceedings. Congress could not possibly have intended such an obvious evasion of the statute.

The second question which we must consider in determining whether Wenzell's activities fell within the scope of the statute is whether he was "directly or indirectly interested in the pecuniary profits or contracts" of the sponsors. We think that the findings of the lower court demonstrate that, at the very least, Wenzell had an indirect interest in the contract which the sponsors were attempting to obtain. That interest may be described as follows: Wenzell was an officer and executive of First Boston; he not only shared in the profits which First Boston made during the year, but he also received a bonus for any business which he brought to the firm; if a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for the proposed Memphis project; if First Boston did receive the contract, it might not only profit directly from that contract, but it would also achieve great prestige and would thereby be likely to receive other business of the same kind in the future; therefore, Wenzell, as an officer and profit-sharer of First Boston, could expect to benefit from any agreement that might be made between the Government and the sponsors.

The respondent urges that Wenzell had no interest because First Boston had no more than a mere hope that it might receive the financing work were the negotiations

in which Wenzell participated to culminate in a contract. However, the findings of fact and the conclusions of the Court of Claims belie the respondent's assertion. First Boston had arranged the financing on the OVEC project and had acquired a reputation in the area of private power financing. Wenzell had also acquired a certain expertise in this area by virtue of his previous work for the Budget Bureau in preparing the TVA analysis. It was therefore probable that First Boston's services would again be utilized should the sponsors obtain a contract to construct a project similar to OVEC. That this expectation was not baseless is demonstrated by the fact that as early as February 20, 1954, Dixon's counsel expressed apprehension about Wenzell's duality since it seemed likely that First Boston would receive the financing contract. Even Wenzell must have thought very early in the negotiations that First Boston would probably be retained to do the financing, for on February 23, 1954, he told Hughes that should First Boston be retained, he might be criticized for having "improperly used his position in the Bureau to obtain business for First Boston." Wenzell's apprehension was confirmed by First Boston's counsel, who advised Wenzell to resign from the Bureau of the Budget "forthwith and in writing." This advice was undoubtedly premised on the realization that First Boston stood a good chance of receiving the financing contract. The Court of Claims recognized that from the outset there was a "substantial possibility" that First Boston would be retained. It said:

> "There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such

enterprises, might be employed by the company which got the contract." — Ct. Cl. —.

"He [Wenzell] had an interest in First Boston which company, *by the logic of circumstances*, might be offered the work of arranging the financing of the project when and if a contract for the project should be made." — Ct. Cl. —. (Emphasis added.)

It was the "logic of circumstances" referred to by the Court of Claims that placed Wenzell in the ambivalent position at which the statute is aimed. Wenzell, as an agent of the Government, was entrusted with the responsibility of representing the Government's interest in the preliminary stages of a very important contract negotiation. However, because the sponsors were in a position to affect the fortunes of himself and his firm, he was, to say the least, subconsciously tempted to ingratiate himself with the sponsors and to accede to their demands, even though such concessions might have been adverse to the best interests of the Government. By thus placing himself in this ambiguous situation, Wenzell failed to honor the objective standard of conduct which the statute prescribes.

The respondent suggests that Wenzell was never really subject to any temptations because he was not in a position whereby he could have sacrificed any of the Government's interests. Once again, however, the respondent takes an unrealistic view of the facts. We have already described how important a role Wenzell played in this transaction. In fulfilling that role, Wenzell, on numerous occasions could have taken action that would have favored the sponsors to the detriment of the Government. For example, he could have concurred too easily with the sponsors as to specific items of the proposals or of the cost estimates; or

he could have failed to press the Government's position on items of cost vigorously enough; or he could have suggested acceptance by the Government of a proposal which, for one reason or another, should not have been approved. However, we need not deal exclusively in the realm of conjecture. The findings of the Court of Claims disclose numerous instances in which Wenzell seemed to be more preoccupied with advancing the position of First Boston or the sponsors than with representing the best interests of the Government. For example, after the joint TVA-AEC analysis was made available, Wenzell helped draft a letter which the sponsors planned to submit to the Government as a rebuttal to the unfavorable conclusions contained in the analysis. We should think that one who represented the Government would be more interested in defending the Government's position than in helping the sponsors to attack it. On another occasion, Wenzell performed a "personal favor" for Dixon by obtaining some information on the cost of money from his associates at First Boston. As it later turned out, this information was to constitute the framework around which the sponsors constructed their proposal. By submitting the information to Dixon on the stationery of First Boston, and by subsequently arranging a meeting between the sponsors and some officers of First Boston so that the information could be confirmed, Wenzell was able constantly to keep First Boston in the forefront of the picture.[16] It is therefore not surprising either that the sponsors did choose First Boston to conduct the major part of the financing, or that Woods, the Chairman of First Boston, subsequently thought that "the financing, which First Boston had been retained to handle, had flowed directly from the conversa-

[16] That Wenzell, on at least two occasions, brought senior officers from First Boston with him to negotiating sessions is further evidence of the fact that Wenzell frequently attempted to place First Boston in a position of predominance.

tion which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in connection with its power policy." That Wenzell's primary allegiance was to First Boston and that his loyalty to the Government was a fleeting one is shown by the fact that after he had finished his report on TVA in 1953, he showed a copy of that confidential document to Woods, even though he had been expressly told by Dodge to show the report to no one; and by the further fact that when First Boston agreed to do the financing, Wenzell did not keep his promise to Dodge to inform the Budget Bureau of any arrangement between First Boston and the sponsors and to submit that arrangement to the Bureau for approval. It may be true, as the respondent asserts, that none of Wenzell's activities to which we have alluded adversely affected the Government in any way. However, that question is irrelevant to a consideration of whether or not Wenzell violated the statute. As we have indicated, the statute is preventive in nature; it lays down an absolute standard of conduct which Wenzell violated by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute.[17]

---

[17] The fact that First Boston subsequently decided not to accept a fee is irrelevant to a determination of whether Wenzell violated the statute. First Boston's decision was not reached until many months after Wenzell had terminated his connection with the Bureau of the Budget. At the time Wenzell represented the Government, which is the period crucial to our determination, First Boston fully expected to accept a fee for services which it might render, and Wenzell had every reason to expect that he would benefit from any profits that First Boston might make. It was this expectation that infected the transaction, and the taint cannot be removed by a subsequent, unilateral decision on the part of First Boston to forego its fee.

Finally, some mention must be made of certain factors which the Court of Claims cited in reaching the conclusion that Wenzell had not violated the statute. First, both the court below and the respondent intimate that Wenzell could not have expected to benefit from the contract because there was no formal contract or understanding between First Boston and the sponsors to the effect that First Boston would be retained should the sponsors enter into an agreement with the Government. However, we do not think that the absence of such a formal agreement or understanding is determinative. The question is not whether Wenzell was certain to benefit from the contract, but whether the likelihood that he might benefit was so great that he would be subject to those temptations which the statute seeks to avoid. That there was more than a mere likelihood in this case has already been shown. Second, the Court of Claims stressed the fact that Wenzell's goal of advancing the cause of private power coincided with the Administration's general objective. However, that fact cannot serve to exempt Wenzell from the coverage of the statute. In fact, the more evidence an agent gives of agreement with the policies of the Administration, the more responsibility he is likely to be given, and in case of a conflict of interest, the greater is the possible injury to the Government. Third, the Court of Claims relied strongly on the fact that Wenzell did not think that he was involved in a conflict-of-interest situation. How Wenzell could have thought otherwise following the admonitions of both Dixon's counsel and First Boston's counsel and his own statements in that regard is difficult to understand. However, even assuming that Wenzell did not think there was a conflict, that fact is irrelevant. As we have shown, the statute establishes an objective, and not a subjective standard, and it is therefore of little moment whether the agent thought he was violating the statute if the objective facts show that there

was a conflict of interest. Finally, both the Court of Claims and the respondent make much of the fact that Wenzell's immediate superiors in the Bureau of the Budget knew of his activities and of his interest in First Boston. True as this fact is, it is significant, we think, that no one in the AEC, which was the governmental contracting agency, and which had expressed reluctance about the contract throughout the negotiations, had knowledge until December 1954 that "Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project." In any event, the knowledge of Wenzell's superiors and their approval of his activities does not suffice to exempt Wenzell from the coverage of the statute. Neither Section 434 nor any other statute empowered his superiors to exempt him from the statute, and we are convinced that it would be contrary to the purpose of the statute for this Court to bestow such a power upon those whom Congress has not seen fit to so authorize. Congress undoubtedly had a very specific reason for not conferring such a power upon high level administrators. It recogized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest. The prohibition was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. It is not surprising therefore that we have consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict. *Ewert* v. *Bluejacket*, 259 U. S. 129; *Prosser* v. *Finn*, 208 U. S. 67.

The thrust of the arguments made by the respondent and adopted by the Court of Claims is that it would be unjust to apply the statute to one who acted as Wenzell did in this case. We cannot agree. The statute is di-

rected at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil. Against this background, it seems clear to us that Wenzell's duality, which aroused the fears of his own counsel and the suspicions of many observers, was the very type of conflict at which the statute is aimed. That Wenzell was aware of his dual position early in the negotiations; that he was advised by his own counsel to resign "forthwith and in writing"; that he did not terminate his association with the Budget Bureau until the final proposal had been submitted; that he never formally resigned his position with the Bureau, as he had been advised to do; and that his activities fall within the literal meaning of the statute have all been demonstrated. In the light of these circumstances, we think that the respondent's reliance upon the so-called equitable considerations in Wenzell's favor is misplaced.

Because of the respondent's assertion that an application of the statute to Wenzell will make it impossible in the future for the Government to obtain the services of private consultants on a part-time basis, we emphasize that our specific holding, on the facts before us, is that § 434 forbids a government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interests, he may benefit financially from the outcome of those transactions.

Second. Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not

specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. *E. g., Miller* v. *Ammon*, 145 U. S. 421; *Bank of the United States* v. *Owens*, 27 U. S. (2 Pet.) 527; 6 Williston, Contracts (rev. ed. 1938), § 1763. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in Section 434.

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.

Nonenforcement of contracts made in violation of Section 434 and its predecessor statutes is not a novel remedy. On at least two occasions the Court of Claims has held that the Government could disaffirm contractual obligations arising from transactions which were prohibited by the statutory antecedent to Section 434. *Rankin* v.

United States, supra; Curved Electrotype Plate Co. v. United States, 50 Ct. Cl. 258. See also *Michigan Steel Box Co. v. United States*, 49 Ct. Cl. 421. In reaching its decision in this case, the Court of Claims appears to have abandoned these precedents, and instead placed great reliance upon our decision in *Muschany v. United States*, 324 U. S. 49. However, we find no difficulty in distinguishing that case from the instant situation. The *Muschany* case involved a government land agent whose activities not only were authorized by the National Defense Act of 1940, 54 Stat. 712, but also were found by the Court to be outside the purview of the conflict-of-interest statutes. Therefore, unlike this case, *Muschany* did not involve a contract which resulted from an illegal transaction, and it is consequently understandable that the contract there in question was enforced.[18]

The Court of Claims was of the opinion that it would be overly harsh not to enforce this contract, since the sponsors could not have controlled Wenzell's activities and were guilty of no wrongdoing. However, we think that the court emphasized the wrong considerations. Although nonenforcement frequently has the effect of punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. Cf. *Crocker v. United States*, 240 U. S. 74, 80–81. It is this inherent difficulty in detecting corruption which requires that con-

[18] The other cases relied upon by the respondent, *United States v. Chemical Foundation*, 272 U. S. 1; *Architects Building Corp. v. United States*, 98 Ct. Cl. 368, are also distinguishable on the ground that the activities of the government agents there involved were found by the courts not to constitute a violation of any conflict-of-interest statute. Therefore, since the contracts in those cases had not emanated from an illegal transaction, they were enforced.

tracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. Cf. *Hazelton* v. *Sheckells*, 202 U. S. 71, 79. Therefore, even if the result in a given case may seem harsh, and we do not think that such is the case here,[19] that result is dictated by the public policy manifested by the statute. We agree with Judge Jones' statement that "the policy so clearly expressed in 18 U. S. C. 434 leaves no room for equitable considerations. . . . If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions." — Ct. Cl. — (dissenting opinion).

In concluding that the sponsors were entitled to enforce their contract, the court below expressed the opinion that the Government may not avoid a bad bargain by relying upon a conflict of interest which was directly caused by high officials in the Bureau of the Budget. Of course, the Government could not avoid the contract merely because it turned out to be a bad bargain.[20] See *Muschany* v. *United States, supra*, at 66–67. However, that is not the issue before us. The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest. As we have indicated, the public

---

[19] We do not think that the result in this case is harsh because the sponsors were not as naive regarding the conflict-of-interest question as the Court of Claims implied. They recognized Wenzell's conflict of interest almost from the outset of the negotiations. However, instead of refusing to negotiate with Wenzell or of making it clear both to Wenzell and to all the other interested parties that if Wenzell participated in the negotiations, First Boston would under no circumstances be considered as the financing agent for the project, the sponsors dealt almost exclusively with Wenzell and continually fortified his belief that First Boston would be selected as the financing agent should a contract result from the negotiations.

[20] There is nothing in the findings to show whether the contract here involved was favorable or unfavorable to the Government.

policy embodied in Section 434 requires nonenforcement and this is true even though the conflict of interest was caused or condoned by high government officials. The same strong policy which prevents an administrative official from exempting his subordinates from the coverage of the statute also dictates that the actions of such an official not be construed as requiring enforcement of an illegal contract.[21]

Although nonenforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection which Congress decreed by enacting Section 434.[22]

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

---

[21] It should be remembered that the contracting agency, the AEC, had virtually no knowledge of the activities which Wenzell was conducting on behalf of the sponsors during his tenure with the Bureau of the Budget. It may well be that had the AEC known of these facts, it would have insisted that Wenzell be precluded from representing the Government, or, at least, would have scrutinized his recommendations more closely.

[22] The respondent also contends that even if the contract is not unenforceable, a recovery *quantum valebat* should be decreed. However, such a remedy is appropriate only where one party to a transaction has received and retained tangible benefits from the other party. See *Crocker* v. *United States*, 240 U. S. 74, 81–82. Since the Government has received nothing from the respondent, no recovery *quantum valebat* is in order.

SUPREME COURT OF THE UNITED STATES

No. 26.—October Term, 1960.

United States, Petitioner, v. Mississippi Valley Generating Co., etc.	On Writ of Certiorari to the United States Court of Claims.

[January 9, 1961.]

Mr. Justice Harlan, whom Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

In a case like this controlling legal issues are apt to become blurred under the urge of vindicating a public policy whose importance no one will dispute. However, we sit here not as a committee on general business ethics, but as a court enforcing a specific piece of legislation.

While I am bound to say that the Government's defense to this claim for out-of-pocket expenses incurred in a matter that the Government was once anxious to explore, is far from ingratiating,[1] I must agree with the Court that Wenzell's government role in connection with the Mississippi Valley contract, though in the view of the Court of Claims, it was quite peripheral, was sufficient to constitute him one who "acts as an officer or agent of the

---

[1] Wenzell's superiors in the Government were fully aware of his connection with First Boston and of the possibility that First Boston might later figure in the financing of the contemplated private power project; and with such knowledge they affirmatively acquiesced, and indeed encouraged, his continuing in his consultative role. The power contract, which the Government recognizes was the product of hard bargaining and implicitly concedes was fair, was eventually terminated only because the Government had lost interest in it. The defense of illegality was raised for the first time in this suit, and only after a political storm had arisen over the public versus private power issue. Nevertheless I think the Court is right in considering that all these factors are rendered immaterial by the statute in question.

United States" within the meaning of 18 U. S. C. § 434,[2] and that if he was personally "indirectly interested" in that contract via First Boston the case must go for the Government. But in light of the findings of the Court of Claims I cannot agree that Wenzell was so interested within the contemplation of § 434. In my opinion this Court's contrary conclusion rests upon too loose a view of the controlling statutory phrase.

Referring to the period of Wenzell's governmental service, the Court of Claims concluded:

> "There is not a shadow of evidence that it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal [of the Dixon-Yates group] which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation [Mississippi Valley] which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding."

I do not understand the Court to take issue with this conclusion or with any of the findings of the Hearing Examiner on which it was based. It could not well do so, cf. *Commissioner* v. *Duberstein*, 363 U. S. 278; nor does the Government ask this. Rather, the Court finds

---

[2] "§ 434. *Interested persons acting as Government agents.* Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

the prohibited "indirect interest" to consist of Wenzell's expectation in the probability that First Boston, by virtue of its reputation in the field of private power financing and its having previously arranged the financing for a similar project, would eventually share in the financing of this venture.

I do not believe that such a probability alone gives rise to a contaminating interest under § 434. The fact that the probability eventuated into actuality after Wenzell's government service terminated can hardly be relevant, for what the Court, under its view of the statute, correctly says as to the immateriality of First Boston's later waiver of commissions must surely also work in reverse. Whether or not a prohibited interest exists must be determined as of the period during which an individual is acting for the Government. And when the asserted interest arises "indirectly" by way of a subcontract, its existence can, in my opinion, only be found in some commitment, arrangement, or understanding obtaining at that time between the prime contractor and subcontractor.[3] I believe this latter proposition is supported by persuasive considerations.

First. It fits the language of § 434, whereas the Court's view does not. The statute does not speak of the disqualifying factors in terms of expectations or probabilities, but imports a precise standard, that is, a present status or pecuniary interest arising from some existing relationship with the business entity contracting with the Government. Certainly this is true as to an "officer," "agent," or "member" of the contracting enterprise. It is equally true of one disqualified by reason of "being . . . directly . . . interested in the pecuniary profits or contracts" of such an entity. I can see no reason why it should not also be

---

[3] Whether absence of knowledge of such an arrangement on the part of the individual concerned would be a defense is a matter not presented by this case.

true as to one "indirectly" so interested, requiring in this instance proof of some then existing arrangement between Mississippi Valley and First Boston. I do not mean to suggest that such an arrangement must be evidenced by a formal agreement, for of course any sort of tacit understanding or "gentlemen's agreement" will suffice. But here the Court of Claims has expressly found against the existence of any such thing.

Second. The view which I take of the matter also fits the purposes of § 434. The policy and rationale of the statute are clear: an individual who negotiates business for the Government should not be exposed to the temptation which might be created by a loyalty divided between the interest of the Government and his own self-interest; the risk that the Government will not be left with the best possible transaction is too great. In terms of these factors, a finding of some commitment, arrangement or understanding between the prime contractor and the subcontractor should be required when the contracting officer's adverse interest arises by way of a subcontract, since only where some such arrangement exists can the officer be taken to have known that any undue benefit he confers on the prime contractor will not eventually redound to the profit of some other competing subcontractor.

Here, for instance, it was found below that Mississippi Valley "a month after Wenzell's Government employment ended . . . felt perfectly free to give the bondselling business to whomever it pleased." Hence if Wenzell did in fact confer some undue benefit on Mississippi during the term of his government service (although none is suggested), he must have known that he was conferring that benefit at large, and that if First Boston later were to share in it this would only be the consequence of its having successfully competed against other investment

bankers with similar qualifications. Furthermore, where the government officer's eventual indirect participation in the contract which he has negotiated (by hypothesis improperly) depends on the chance of competition after he has lost the leverage which his position gave, then it would be subject to the additional hazard that although the contractor has received a boon at his hands, all the subcontractor receives is such a normal subcontract as he might have had in any case.

Third. The Court's interpretation of § 434 introduces unnecessary and undesirable uncertainties into the statute. Instead of presenting the individual concerned or the trier of fact with a definite standard for determining whether a disqualifying interest of this kind is present—the existence *vel non* of a commitment or undertaking between the primary and secondary contractors—the question is left at large. The opinion in this case indeed highlights the matter. For after apparently agreeing that a "mere hope" that First Boston might share in the financing of the power contract would not be enough, the Court goes on to describe that eventuality in a variety of ways—that there was "a substantial probability" of it; that it was "probable"; that "it seemed likely"; that it "stood a good chance" of coming to pass; and that it might simply follow from the " 'logic of circumstances' " as a " 'substantial possibility.' "

Such uncertainty, inherent in the Court's view of the statute, is bound to cause future confusion in an area where the line of demarcation should be clear cut. As time goes on it will face many conscientious persons with the kind of close and subtle niceties which, as every judge and lawyer knows, often attend a matter of possible disqualification. Such illusive factors should not be imported into a statute governing the conduct primarily of laymen serving the Government.

Fourth. I think there is affirmative ground in the pattern of conflict-of-interest legislation for not attributing to Congress the purpose which the Court here does. The statute in question is the most general conflict-of-interest enactment, but there are other provisions of law, as well as federal regulations, which also deal with the subject. Particularly 5 U. S. C. § 99 and 18 U. S. C. § 284 indicate a different approach to the problem. The two statutes disqualify former officers and employees of governmental agencies or departments for a period of two years from prosecuting or aiding in any way in the prosecution of a claim which had been pending at the time of their employment. A similar approach is suggested by this Court's Rule 7 which prohibits clerks and secretaries from practicing before this Court for a period of two years after leaving the Court, and from participating in any way in a case which was before the Court during the term of their employment. Cf. Canon 36 of the Canons of Professional Ethics of the American Bar Association.

The interpretation which the Court today gives 18 U. S. C. § 434, if it is to be taken as more than a disposition of this particular controversy, will go a long way to assimilating that statute in practical effect to the absolute disqualification type of provision, for certainly where criminal sanctions are involved no prudent man will risk later acquiring an interest in a contract which he helped to negotiate during a previous term of government employment. Whether such a rigid rule, of a kind traditional in the legal profession, should also be regarded as one of general morality in the public service may, of course, well be debated. However, Congress did not, in my view, enact this precept into law in the present statute, and where it has enacted this policy it has done so with a clarity and precision, which I feel the present reading of § 434 lacks.

I would affirm.